AUG 19 1974
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In The Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-136

RUSHTON & MERCIER WOODWORKING CO., INC. & RAND & COMPANY, INC., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BURTON PELTZ
300 C Street
Boston, Massachusetts, 02127
Counsel for Rand & Company, Inc. &
Rushton & Mercier Woodworking Co., Inc.

Of Counsel: Arthur T. Wasserman

August 16, 1974

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v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners Rushton & Mercier Woodworking Co., Inc. (Rushton) and Rand & Company, Inc. (Rand) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 21, 1974.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit in *National Labor Relations Board v. Rushton & Mercier Woodworking Co., Inc. and Rand & Company, Inc., 73–1289, is reprinted in the Appendix.*

JURISDICTION

The judgment of the Court of Appeals was entered on March 21, 1974. Petitioners' Application for Extension of Time

In Which to File a Petition for Writ of Certiorari was granted on May 31, 1974 extending the time for filing the Petition for Writ of Certiorari from June 20, 1974 to August 19, 1974. This Petition for Certiorari has therefore been timely filed. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED

1. WHETHER ABSENT EVIDENCE OF A PLOT TO REPLACE A MORE EXPENSIVE LABOR UNION WITH A CHEAPER ONE, WHERE THERE IS A FINDING THAT THE EMPLOYER IN NO WAY INTERFERED WITH OR ASSISTED IN THE FORMATION OF THE CHEAPER UNION, A FINDING OF SUCH PLOT CAN BE SUSTAINED.

2. WHETHER DESPITE A FINDING THAT a) NO VIOLATION OF THE NATIONAL LABOR RELATIONS ACT OCCURRED UNTIL THE EMPLOYERS RELOCATED THEIR PREDECESSOR'S BUSINESS IN THEIR (EMPLOYERS') PLANT AND b) EMPLOYERS CONTINUED TO OPERATE IN THE SAME MANNER AS HAD THEIR PREDECESSOR, A FINDING THAT THE EMPLOYERS ARE NOT THE SUCCESSORS TO THEIR PREDECESSORS AND THEREBY OBLIGATED TO RECOGNIZE THEIR (PREDECESSORS') COLLECTIVE BARGAINING AGREEMENT CAN BE SUSTAINED.

3. WHETHER DESPITE A FINDING THAT THE EMPLOYERS OPERATED THE BUSINESS AS HAD THEIR PREDECESSOR, WHICH OPERATION, WORK PERFORMED, EQUIPMENT, AND DEGREE OF SKILL DIFFERED FROM WHAT ONE OF THE EMPLOYERS ORIGINALLY HAD PERFORMED, A FINDING THAT THE EMPLOYERS ARE "ALTER EGOS", CAN BE SUSTAINED.

4. WHETHER DESPITE FINDINGS THAT AFTER EMPLOYER SHUT DOWN ITS OPERATIONS a) IT REQUESTED A COPY OF THE NEW UNION CONTRACT AND WAS NEVER SENT ONE AND b) THE UNION NEVER CONTACTED EMPLOYER UNTIL FOUR MONTHS LATER (AFTER EMPLOYER HAD COMMENCED A DIFFERENT TYPE OF BUSINESS WITH A DIFFERENT UNION INHERITED FROM ITS PREDECESSOR), A FINDING THAT THE UNION HAS NOT WAIVED ITS RIGHT TO COLLECTIVE BARGAINING CAN BE JUSTIFIED.

5. WHETHER DESPITE A FINDING OF NO INTERFERENCE OR ASSISTANCE IN THE FORMATION OF A UNION, AN ORDER DIRECTING REPAYMENT OF ALL UNION INITIATION FEES, DUES AND OTHER SUCH CHARGES CAN BE SUSTAINED.

6. WHETHER AN OFFER OF REINSTATEMENT TO ALLEGED DISCRIMINATEES OF "THE RIGHTS AND PRIVILEGES, IF ANY, TO WHICH YOU MIGHT LEGALLY BE ENTITLED" AT A RATE OF PAY LOWER THAN PAID BEFORE, TOGETHER WITH THE EMPLOYER'S GUARANTEE TO REIMBURSE THE PAY DIFFERENTIAL RETROACTIVELY SHOULD THE DISCRIMINATEES' UNION PREVAIL, CAN SUSTAIN A FINDING THAT IT IS INSUFFICIENT TO TOLL BACKPAY LIABILITY.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. 158 (a)(1), (2), (3), & (5)

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: PROVIDED FURTHER, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to

other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT OF THE CASE*

A. FACTS

Rand is a Massachusetts corporation which, prior to April 30, 1971, was engaged in the business of manufacturing store fixtures at its plant in Boston, Massachusetts. Morris Rand is president and all of the company's stock is owned by his wife (A.11, 151, 158). Most of Rand's employees were carpenters included in a craft unit represented by Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Local 51) (A.51, 14, 89-90). This unit did not include a number of relatively unskilled employees classified as laborers, assemblers, painters and drivers (A.215-216). Rand had for over 20 years had a collective bargaining contract with Local 51, the last contract being dated May 1, 1968 and expiring April 30, 1971 (A.11, 288). At no time prior to April 30, 1971 did Local 51 contact or attempt to contact Rand concerning renegotiating the contract (A.292-293). Indeed, the first conversation with regard to that contract did not occur until September 17, 1971 (A.347-348).

Prior to 1971, Rand's principal customer was Zayre (A.12, 285), for which Rand for many years was its sole supplier of

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* The record is hereinafter cited as A, and the Supplemental Record as S.A.

store fixtures (A.12, 294-295) which it would build on a mass production basis (A.12, 328). This would require work in four departments by different personnel in each: milling, initial assembling, painting and final assembling (installing lights, trim, etc.) (A.13, 322-323). Commencing with 1969, Rand lost a good deal of the Zayre store fixture account, culminating in Rand losing the account completely in January 1971 (A.13, 294-295, 324, 327-330, 363-365). As the remaining Zayre orders were being completed, the number of employees (union and non union) were reduced in a non-discriminatory manner (A.331-332). All work was thus completed by April 30, 1971, the day the Local 51 contract expired (A.14, 334, 199). All but 3 employees (2 painters and a laborer) were discharged (A.16, 90). The economic reasons for the shutdown were communicated to the employees and union steward (A.157).

Rand attempted to regain some of the lost Zayre business as well as to solicit new chain store business, without success (A.369, 371; S.A. 6-7). The only work it could obtain from May to September, 1971 was approximately $20,000 worth of small custom orders (A-17; General Council Exhibit 10-A, 139, 186-187, 323, 326; S.A.8). Since the "breakeven" point for Rand was approximately $100,000 of orders per month (A.325-326), it obviously was not economically feasible to reopen the Rand shop. Rand did subcontract out these small custom orders, as it had always subcontracted such custom orders in the past (A.301). Some went to Peter Brankowitz Corp., a wholly owned subsidiary of Rand in New Jersey, as well as to several others (A.17, 186). Commencing in June, subcontracting work was given to Rushton & Mercier Woodworking Co., Inc., (R&M), a New Hampshire Company, (A.17, 186). This was accomplished because of the suggestion of a mutual friend of one of the principals of R&M and Burke, Rand's production manager.

Burke then learned of R&M's financial difficulties and possible cessation of business because of differences between the principals of R&M (A.19, 167, 351). Burke also became aware of R&M's excellence on custom work, all of which he reported to Mr. Rand (A.166-168, 298-299, 346-348). Because of R&M's financial and other problems, Rand decided to purchase the name and goodwill of R&M, the services of several of its excellent craftsmen and an agreement to do work on a cost-plus basis. Such an agreement was signed on June 25, 1971 after negotiations by attornies for both companies (General Counsel Exhibit 5-A.120, 169-170). It was then hoped that R&M would be able to remain in New Hampshire and do the custom work for Rand which Rand could not do and had never done (A.220, 221, 245, 301, 351). Because of the increase in R&M business, four new employees were hired (A.210).

Three days later, two organizers for International Union of District 50, Allied and Technical Workers of the U.S. and Canada (District 50) appeared at R&M, invited the employees to lunch and subsequently obtained signed organization cards of all the employees (A.20-21, 230-231). Tom Rushton, who had never dealt with a union before (only having had 2 employees up to a few days before, A.18, 173-174), referred the matter to Rand's representative, Burke (A.21, 176). Also, because of the "cost plus" feature of the newly executed contract between Rand and R&M, wages were obviously of vital concern to Rand (A.207). Burke consulted with his superiors at Rand and on July 1, 1971, R&M signed the recognition agreement with Local 50 (General Counsel's Exhibit 3, A.106, 21, 180-181). Burke then proceeded to negotiate the collective bargaining agreement for R&M, culminating on its execution on or about August 1, 1974 (A. General Counsel's Exhibit 6, A.123-135).

Because of conflicts between the principals of R&M, the Merrimac Bank (and other creditors) threatening foreclosure

against it, and more work than was capable of being produced at the New Hampshire locus with no possibility of a variance to permit expansion (S.A. 11-13, A.361-362), in late August, it was therefore decided to relocate in the old Rand premises (A.304-305, 352-353).

On September 2, 1971, Rand decided to incorporate Rushton in Massachusetts as a wholly owned subsidiary of Rand, just as Peter Brankowitz had been organized in New Jersey as a wholly owned subsidiary of Rand (A.158, 304-305; General Counsel's Exhibit 7, A.136). R&M shut down in New Hampshire on September 3 and on September 7 Rushton opened in the Rand location with the same employees, work and supervision as in New Hampshire (A.194, 218-219, 352-353). The Local 50 agreement was applied (A.23, 353-354).

The work continued in Boston as it had been in New Hampshire small custom order work (1 or 2 of a kind, total order about $5,000-$10,000) rather than the production run of 50-100 identical items on order of approximately $100,000 or more as Rand had formerly done (S.A.17, 20, 53-54). None of the production machinery at the Boston plant was used, as it was not suited for the custom work; similarly, equipment never used before (because geared to custom work) was installed (A.195-196, 210; S.A.53). Rather than utilize separate departments with skilled craftsmen in each department and detailed blueprints as Rand had done on production work, Tom Rushton or one of his old employees stayed with a job from start to end, laying it out, making drawings, if necessary, cutting, fabricating, etc. and leaving the asembling to unskilled help (S.A.8-9, 17-20, 50, 54; A.212, 355). The work force increased from 6 (plus the supervisory help, all originally from R&M) to 20, of which number only 8 would have fit the Local

51 craft union classification structure (A.24, 210, S.A.19). Further, it was testified that a craft union could not function with fewer than 35 people (S.A.19).

On September 29, Local 51 filed an unfair labor charge against Rand and Rushton, which it supplemented November 8, 1971 (General Counsel Exhibits 1(a) and 1(c), A.69 and 70). Thereafter, by letters dated October 26 and November 26, 1971 and March 17, 1972 (in seniority groupings), Rushton offered reemployment to members of Local 51 who had been discharged the prior April (A.63, Charging Party's Exhibit 1, A.147). Those former employees who appeared were told they would be paid at Local 50 rates but, if Local 51 prevailed in its claim, they would be reimbursed retroactively (A.357-358). Not many former employees responded to the notice (A.356-360).

B. TRIAL EXAMINER'S DECISION

The Trial Examiner found that Rushton had been performing work similar to that subcontracted to R&M in New Hampshire, i.e., custom small orders, rather than the mass production work Rand had performed (A.25). He found there was greater care taken in milling resulting in less skill being required of the carpenters who assembled the pieces; no departmentalization of work; and no use of mass producing equipment (A.26). Aside from the testimony of only 1 witness as to anti-union animus and an overriding plot to "dump" a union, he found "the chain of coincidences . . . too long to be credible." (A.24). He therefore found Rushton the "alter ego" of Rand (A.24), and branded all of their conduct "a plan to replace Local 51 with a less expensive union which factor destroyed the legitimate considerations in shutting down, thus resulting in Section 8(a)(3) and (5) violations" (A.32-34). He also found the subcontracting to R&M a violation (A.34).

He further found that "General Counsel had the burden of establishing unlawful recognition, which he said he would but did not do on this record . . . . But he established nothing . . . . Evidence of the violation alleged (8(a)(2)) was simply not established." (A.34-36). He then said that this was true as to R&M, but pointed out that it was not even charged with a violation. He found the series of events and facts showed that Rand and Rushton violated Section 8(a)(2) (A. 40-41).

In his remedy, he ordered a withdrawal of recognition from Local 50, reimbursement of all union dues, fees, etc., withheld from wages for the benefit of 50, bargaining with 51, and reimbursement of lost wages to all Rand employees (unit and non unit) from April 30, 1971 (A.42-44).

THE BOARD

The Board disagreed with the Trial Examiner in several respects: 1) Rand did not act unlawfully in shutting down in April, 1971 (A.61); 2) Rand did not act unlawfully in subcontracting work from May through August of that year, since it "had in the past always subcontracted between five and ten per cent of its work without consulting with Local 51 and that the work involved was not sufficient to warrant reopening the plant." (A.61); 3) no violation occurred prior to September, 1971 (A.61); 4) non unit employees were not eligible to receive back pay (A.62); and 5) the offers of employment were insufficient to toll Rand's obligation for back pay (A.64).

D. THE COURT

The Circuit Court of Appeals affirmed, stating that "substantial evidence, taken on the record as a whole, fully supports that Board's factual determinations." (Infra p.33)

REASONS FOR GRANTING THE WRIT

I. THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD SUPPORTING THE FINDING OF AN EMPLOYER PLAN TO REPLACE AN EXPENSIVE UNION WITH A CHEAPER ONE PERFORMING WORK SUBSTANTIALLY IDENTICAL TO THAT BEING ORIGINALLY PERFORMED SO AS TO JUSTIFY A FINDING OF "ALTER EGO".

A. SUBSTANTIAL EVIDENCE OF A PLOT IS TOTALLY LACKING.

Perhaps the best way to summarize the attitudes of the Trial Examiner, Board and Court in this case is to utilize the Examiner's own words at A.26 & 27:

> "[T]he chain of coincidences relied on by respondents is too long to be credible. I can swallow one coincidence, and sometimes two, without having my credulity put to the test, but a causeless chain of events in which an organized company in financial trouble just happens to send work to a small, unorganized company in a neighboring State, then just happens to purchase the name and goodwill of that company, then just happens to direct that company to recognize a union which has just happened to appear on the scene and organize its employees, then just happens to negotiate a contract for that company with that union which contains wage rates substantially lower than it would have to pay its old employees, then just happens to reopen its own shop under the name acquired from that other company, utilizing that other company's employees and the lower wage rates permitted by its contract with that union does not square with any experience I have ever lived through."

Later on in his findings he indicated that other matters were "hard to swallow" (A.28).

With this attitude and in spite of substantial and oftentimes uncontroverted evidence to the contrary, he found that Rand violated the National Labor Relations Act, 29 U.S.C. 158(a)(1), (2), (3) & (5). (Sections 8(a)(1), (2), (3) & (5) of the Act) by 1) closing down its plant on April 30, 1971 (only to be reversed on this point by the Board's finding that "it is clear from the record that Respondent Rand & Co. would have shut down in any event in April, 1971" A.61); 2) subcontracting custom order work to Rushton & Mercier from May through August, 1971 (only to be similarly reversed on this point by the Board at A.61); 3) contributing assistance to the formation and operation of Local 50 (despite his own statements that "the burden of coming forth with *evidence* of unlawful assistance rested with General Counsel. But he established *nothing* . . . . Evidence of the violation alleged simply was not established." A.35-36); 4) closing the R&M New Hampshire plant and resuming operations at the Rand situs (despite the evidence of the necessity therefor because of financial problems besetting Rushton & Mercier, inability to expand and increased custom orders, A.304-305, 352-353, 361-362, S.A. 11-13); and 5) finding Rushton the "alter ego" of Rand (despite his finding "that there are, in fact, the differences between the two operations which Respondents rely on. A.30)."

This Court has consistently held that

> "a reviewing court is not barred from setting aside a Board decision when it cannot conscienciously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488.

Applying this Court's further language in *Universal Camera Corp.*, supra, at 491, this is one of those instances "when the standard appears to have been misapprehended or misapplied."

It is submitted that the only evidence whatsoever regarding a "plot" or anti-union animus arises in the testimony of one Infantino, a former employee of Rand (A.15-17, 60-61). The Trial Examiner himself stated, "The only direct evidence in the record of a plot is the testimony of Richard Infantino." (A.6). And Infantino was laid off in June and subsequently received a good job with the Massachusetts Transit Authority through the intervention of the business representative of Local 51 (A.6, 9). Such a solitary piece of evidence cannot and should not be allowed to prevail over the mountain of evidence to the contrary.

In a similar situation, *Robertshaw Controls Company, Acro Division* v. *N.L.R.B.*, 386 F.2d 377 (4th Cir. 1967), the Court held at page 381 that

> "This statement, however, is de minimus when compared with other evidence of record." See also, in this connection, *N.L.R.B.* v. *Interstate 65 Corporation*, 453 F.2d 269 (6th Cir. 1971).

B. RUSHTON IS THE SUCCESSOR TO RUSHTON & MERCIER

General Counsel, having failed to prove any unlawful conduct on the part of R&M, Rushton or Rand in the original unionization of R&M or its collective bargaining agreement, it is respectfully submitted that the "plot" theory must fail. If Rand did indeed have a plot from the beginning to replace one union for another, is not at least a finding necessary that it (or at least its predecessor in interest) unlawfully aided or assisted in the formation and entry of Local 50? The Board (as well as the Trial Examiner), however, both found no evidence of such unlawful conduct, claiming such a finding was unnecessary because they felt there was a "plot".

Section 8(a)(2) of the Act prohibits an employer's dominance or interference with the formation of a union. No matter how great the likelihood of interference must be, there must be a finding of actual dominence or interference. In a case in which a labor organization was very weak, had no independent source of financial support, no constitution or by-laws, the court held

> "These factors may create an unstable organization susceptible to managerial control, but no inference of actual domination can be drawn from these facts alone. *Modern Plastic Corp.* v. *N.L.R.B., supra* (379 F.2d 201) . . . However, in the absence of specific evidence that an employer has so used these powers, this factor is of little weight in determining whether an employer has violated Section 8(a)(2) of the Act." *Federal Mogul Corporation, Coldwater Distribution Center Division* v. *N.L.R.B.*, 394 F.2d 915, 918-919 (6th Cir. 1968). See also, in this regard, *Utrad Corporation* v. *N.L.R.B.*, 454 F.2d 520 (7th Cir. 1971).

In the case at bar

> "there is no showing of actual dominance. The mere possibility is not sufficient." *Continental Distilling Sales Company* v. *N.L.R.B.*, 348 F.2d 246, 251 (7th Cir. 1965.)

Since a chain is only as strong as its weakest link, the absence of any evidence or finding of unlawful interference with the introduction of Local 50 in New Hampshire is fatal to the "plot" theory. Thus, the Board found that Rand's decision to purchase the name and goodwill of R&M, its part in the recognition of District 50 and its incorporating Rushton in Massachusetts were not "a violation of the act in and of themselves." (A.61). In addition, the Board's specific finding of no violation by Respondents "prior to September 1971" (A.61) should totally and completely negate any "plot" theory. Anything occuring after these events should therefore stand on

its own, regardless of prior conduct or actions of the parties, *unless* . . .

Unless this Court is willing to hold that an employer (or his predecessor) that in no way interferes with or assists the formation of a union can be found in violation of the act by subsequently purchasing his predecessor's name and goodwill and continuing the predecessor's operations in his (employer's) original plant, and recognizing his predecessor's collective bargaining agreement. It is submitted that the Board's specific findings of fact negate this holding.

Or, putting it another way, is an employer who terminates his business, and subsequently acquires another somewhat similar business with an existing collective bargaining agreement, bound to recognize that agreement over the one with the union in the business he terminated?

The Petitioners believe that no decisions permit such holdings.

What was said in *N.L.R.B. v. Cen. Vi Ro Pipe Corporation*, 457 F.2nd 775 (9th Cir. 1972) at page 776 is especially pertinent:

> "[A]n automatic renewal clause cannot keep a collective bargaining relationship alive when the employer's business has been discontinued indefinitely. When the plant closed in 1964, the relationship between the company and the union disappeared; there were no employees for the union to represent. . . ."

In the case at bar the April 30, 1971 shutdown did terminate Petitioner's business in Boston. Despite continuing efforts to obtain mass production orders, the business was effectively terminated.

> "[A]n employer has the absolute right to terminate his business for any reason he pleases. . .even if the liquidation is motivated by vindictiveness toward the union. . . ." *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263, 268, 274.
>
> "As a general matter, he [an employer] may completely liquidate his business without violating either Section 8(a)(1) or Section 8(a)(3), whatever the impact of his action on concerted employee activities." *N.L.R.B. v. Brown*, 380 U.S. 278, 283.
>
> "No one would deny that an employer is free to shut down his enterprise temporarily for reasons of renovation or lack of profitable work unrelated to his collective bargaining situation." *American Ship Building Company v. N.L.R.B.*, 380 U.S. 300, 307–308.

And no one can deny that the closing of the Rand plant on April 30 was for lack of work, and not the result of anti union animus. Having closed for legitimate reasons (A.61), the subsequent recognition of Local 50 four months later by Rushton should not be deemed an illegal act (especially since the subcontracting of the same work to R & M for these four months was specifically held to be legal as were all the intervening events until the relocation in Boston and subsequent recognition of the Local 50 Agreement A.61). By holding the subsequent recognition by Rushton of R & M's collective bargaining agreement invalid, the Board is implicitly saying, contrary to all judicial holdings, that an employer can by subterfuge, i.e., subcontracting, accomplish what he could not lawfully do with his own employees, when admittedly there was not enough work "to warrant reopening the plant." (A.61).

This Court in *N.L.R.B. v. Burns Security Services, Inc.* 406 U.S. 272, reiterated the doctrine that a successor in business is bound by the terms of an existing collective bargaining

agreement, although in some instances, he might only be obligated to bargain with the union but not be obligated under the agreement.

> "It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the Board's certification within the normal operative period if a majority of the employees after the change of ownership or management were employed by the preceding employer." *Burns*, supra, at 279.

> "Where there has been a lock, stock and barrel sale of a going concern, resulting in a substantial continuity of identity, the purchaser is bound by the collective bargaining provisions of an agreement between its predecessor and a union." *Ranch-Way, Inc. v. N.L.R.B.*, 445 F. 2d 625, 627 (10th Cir. 1971).

There can be no question that with regard to the work performed by R & M and Rushton, "the basic operations and services performed by the two companies were identical." *Tom-A-Hawk Transit, Inc. v. N.L.R.B.*, 419 F. 2d 1025, 1027 (7th Cir. 1969).

For Rushton to have attempted not to recognize or bargain with Local 50 thus surely would have resulted in a well-founded unfair labor practice charge. *N.L.R.B. v. Zayre Corp.*, 424 F. 2d 1159 (5th Cir. 1970); *N.L.R.B. v. Royal Oak Tool and Machine Company*, 320 F. 2d 77 (6th Cir. 1963).

The subsequent transfer of operations to Boston for valid economic reasons was thus not only proper, but required under the circumstances.

> "It is well settled that where, as here, the employer remains the same, the status of an incumbent union is not impaired by the relocation of the plant." *N.L.R.B. v. Die*

Supply Corporation, 393 F. 2d 462, 467 (1st Cir. 1968). See also, in this connection, *Reynolds Pallet and Box Company* v. *N.L.R.B.*, 324 F. 2d 833 (6th Cir. 1963).

To now hold that the move to Boston with the resultant recognition of Local 50, both legal moves, are illegal because of a plot which is not proved and does not even constitute a violation until after the move was completed in September 1971 (A.61), borders on the ridiculous. Had the move not been made for six months, a year, or more, would that eventual conduct have been a violation of the act? At some point in time, the old collective bargaining agreement must be deemed to be dead. *N.L.R.B.* v. *Cen Vi Ro Pipe Corporation*, supra, at 776.

The Board's decision completely disregards the valid reasons for such actions and conduct (e.g., the existence of the collective bargaining agreement, increased custom order work, no possibility of expanding the physical plant and financial problems of R&M, all as set forth on pages 6-8 supra). Having demonstrated valid economic reasons for its actions, there should be no violation. *N.L.R.B.* v. *Great Dane Trailers*, 388 U.S. 26. *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375.

> "Business changes effected for economic reasons are not proscribed by the act and do not constitute unfair labor practices." *J.A. Hackney & Sons, Inc.* v. *N.L.R.B.*, 426 F. 2d 943, 945 (4th Cir. 1970). See also, *N.L.R.B.* v. *Transmarine Navigation Corporation*, 380 F. 2d 933, 939 (9th Cir. 1967).

Just as the court in *N.L.R.B.* v. *Aluminum Tubular Corporation*, 299 F. 2d 595 (2nd Cir. 1962) found nothing improper in management's closing one of two companies it had and completing the work of the shut down company in the surviving one, even after a union election had just been held in

the shut down one (before its shut down), and where the surviving company had its own union, so too should this Court uphold Petitioners' similar conduct as proper and required by law.

> "This is especially so when, as here, the assimilating business has its own labor contract." Ibid, at 599.

And by ordering Petitioners to recognize and bargain with Local 51 and withdraw support from Local 50 (A.45, 66-67), the Board is requiring Petitioners to bargain with a union to which none of its employees belong and

> "who are strangers to it . . . . The remedy does not effectuate a policy of the Act and indeed violates one of the Act's most basic policies, i.e., freedom to select a bargaining agent. . . . . Yet the remedy fashioned by the Board in this case imposes on the Florida workers bargaining representative without reference to their choice." *Local 57, International Ladies Garment Workers, AFL-CIO,* v. *N.L.R.B.*, 374 F. 2d 295, 300-301 (D.C. 1967, Cert. denied 387 U.S. 942, 395 U.S. 980).

For similar language see *N.L.R.B.* v. *Rapid Bindery, Inc.*, 293 F. 2d 170 (2nd Cir. 1961), wherein the court, after justifying the establishment of another company (doing the same work as the original one owned by the same parties) in a better area with a larger physical plant, closer to post office facilities, and with more men available, as being economically necessary, refused to enforce that part of the order requiring the company to bargain with the union in the original plant which it had since closed. It said at page 177:

> "However, that portion of the order that requires respondent Frontier to recognize union as the exclusive bargaining representative at the Frontier Plant in Tonawanda is not proper insasmuch as union does not appear to represent any of the employees in the Tonawanda Plant."

C. RUSHTON IS NOT THE "ALTER EGO" OF RAND

Petitioners find themselves "on the horns of a dilemma." On the one hand, Petitioners recognize the well-established rule that

> "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment is a statutory subject of collective bargaining under Section 8(d)." *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 215.

This is precisely what Rand did when, after it shut down its operation, it subcontracted the custom work to R&M. This conduct, however, was held by the Board, contrary to the Trial Examiner's finding, *not* to have constituted a violation (A.61). Implicit in its finding, therefore, must be a finding that the work must *not* have been the same work that Rand had performed in its plant under similar conditions of employment. Support for this is found in the Board's statement that Rand had always subcontracted five to ten percent of its work (A.61) and that even though all such work (all custom work) was in the summer of 1971 being subcontracted, the work was insufficient to warrant opening the plant, and, therefore, Petitioners had no obligation to bargain with Local 51 about this.

The second horn of the dilemma arises as a result of the fact that

> "It has long been settled that an employer violates Section 8(a)(3) of the act if he relocates his operation with a purpose to discriminate against his employees for their exercise of the right to organize and bargain collectively. . . ." *International Ladies Garment Workers Union, AFL-CIO* v. *N.L.R.B.*, 463 F. 2nd 907, 919 (D.C., 1972).

As the successor to R&M (as set forth in the preceding pages) and in order to avoid violating the above principle, Petitioners recognized the existing collective bargaining agreement. Yet this conduct was held to be violative of the Act in that Rushton was the "alter ego" of Rand and therefore had a duty to continue to bargain with Local 51. This, despite the already quoted language of the Court in *N.L.R.B.* v. *Burns Security Services, Inc.*, supra at 297 (infra, p. 14) that

> "a mere change of employers or of ownership . . . is not such an 'unusual circumstance' as to affect the Board's certification . . . if a majority of employees after the change of ownership or management were employed by the preceding employer."

How can subcontracted custom work be different in New Hampshire from Rand's original work in Boston, but on its return to Boston, be found to be the same as it originally was in Boston? Where or how did the work suddenly change when it was moved from New Hampshire to Boston? How can this be when the Trial Examiner found that

> "all the work performed by Rushton & Mercier (Mass.) since September 7 has been similar to the subcontracts performed by Rushton & Mercier (N.H.) for Rand & Company before Rand & Company brought its work back to Boston." (A.25).

One of the most succinct statements concerning the standards to be applied in considering whether there has been a "successorship" or "alter ego" can be found in *N.L.R.B.* v. *Interstate 65 Corporation*, supra at 272.

> "Where a substantial change in the nature of the business operations is effected as a result of the change in ownership, a finding of a change in the nature of the employing industry is clearly warranted, relieving the new

> employer from all of the obligations to bargain collectively until such time as a bargaining agent for the new employing industry is determined as required by the act. . . . . If respondent's 'sucession' brought with it a change in the 'essential nature of the [employing] enterprise', then, respondent had no duty to bargain. *Tom A–Hawk Transit, Inc.* v. *N.L.R.B.*, 419 F.2d 1025, 1027 (7th Cir. 1969). . . ."

> "Stated succintly, we must look to all the circumstances accompanying the transfer to determine whether the nature of the employing industry has undergone such a basic change that the collective bargaining unit, as it was under the previous employer, is no longer appropriate. *N.L.R.B.* v. *McFarland*, supra, 306 F.2d at 220; *Alamo White Truck Service, Inc.*, supra, 273 F.2d at 240."

To the same effect see *N.L.R.B.* v. *Aluminum Tubular Corporation*, supra, at 598:

> "Where, however, the nature or extent of the employing enterprise, *or the work of the employees*, is substantially changed, the transfer of a part, or even all, of the physical assets does *not* carry along with it the duty of the former owner to continue bargaining with the former exclusive representative. . . . The controlling fact in each case is therefore whether the employment enterprise substantially or essentially continues under the new ownership as before." (Emphasis added.)

The Trial Examiner aptly summarized the nature of Rand's operations at A.13:

> "Rand & Co. used mass production techniques in the sense that products moved through four departments, i.e., the mill where the wood was cut, assembly where the wood was put together, painting and final assembly where items such as lights and trim were added, while the employees, generally, stayed in one department. Because it did not use precise milling techniques, Rand & Co's. carpenters were required to exercise greater craft skills than would have been the case if its millwork had been more precise."

R&M's and Rushton's operations, both in New Hampshire and Massachusetts differed completely (A.25–26).

> "Rushton & Mercier (Mass.) has been producing small custom orders rather than large mass production orders for store fixtures. As a result, the operations of Rushton & Mercier (Mass.) now are not identical with the operations of Rand & Co. then. In the first place, in order to improve its product line, Rushton & Mercier (Mass.) has switched to a style of fixtures in which wood is inserted into a stainless steel frame. Also, greater skill and care are used in milling operations so that relatively less skill is required of the carpenters who assemble the fixtures. In addition, the operations now are not departmentalized to the same degree they were under Rand & Co. so that individual carpenters tend to work on individual fixtures throughout the production process rather than tend to work on one operation only. Finally, while Rushton & Mercier (Mass.) is using only tools and equipment formerly used by Rand & Co. (the tools and equipment belonging to Rushton & Mercier (N.H.) are still in the possession of Edward Mercier), it is not using one large piece of machinery called a double-end tenoner formerly used by Rand & Co. because it is only suitable for a mass production operation."

Despite his finding that Rand was essentially a mass production operation whereas Rushton was a custom made operation (A.29, 30), he found the end products the same

> "store fixtures made out of essentially the same material wood requiring essentially the skills of the same sort of employees carpenters performing essentially the same tasks milling and assembling wood. . . . . ." (A.30).

These findings were upheld by the Board (A.53–55).

There can be no question but that the work of the employees was changed both as to method, degree of skill and departmentalization. The type of work changed, too. Clearly,

the "nature or extent of the employing enterprise, or the work of the employees, is substantially changed. . . ." *N.L.R.B.* v. *Aluminum Tubular Corporation*, supra, at 598.

It is submitted that the change in Petitioners' business from mass production to custom work is closely akin to the change in business in *N.L.R.B.* v. *Alamo White Truck Service, Inc.*, 273 F.2d 238 (5th Cir. 1959). White Motor Company was a national retailer of its trucks. Two of its employees established a corporation, bought the local company and changed from nation-wide sales to a service oriented type of business. The court found that it was not the "alter ego" of the original, stating that the

> "'parental relation between White and its San Antonio operation was abrogated–the umbilical cord had been severed.' We add, and the child bears no resemblance to its parent." Id at 242.

Similarly, in *N.L.R.B.* v. *Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), the court upheld the company's actions in changing its distribution system by selling all its trucks and equipment to an independent contractor which then provided the delivery services. The court held at page 111 that there was no violation in refusing to bargain as this was a "change in basic operating procedure." Surely, the custom order work entailed and involved a like "change in basic operating procedure" as well as in the method of production.

It is submitted that in *N.L.R.B.* v. *Fleetwood Trailer Co.*, supra, this Court recognized that changes in methods of production or operation would justify a holding of no "alter ego" status. In that case, the employer filled strikers' jobs and refused to reinstate the strikers later. The Court held at pages 379-380:

> "A second basis for justification is suggested by the Board—when the striker's job has been eliminated for substantial and bone fide reasons other than considerations relating to labor relations: for example, *'the need to adapt to changes in business conditions or to improve efficiency.'* We need not consider this claimed justification because in the present case no *changes in methods of production or operation* were shown to have been instituted which might have resulted in eliminating the strikers' jobs." (Emphasis added.)

It is therefore respectfully submitted that this Court should grant Petitioners writ and find that there was no plot, that Rushton and Rand were the successor to R&M, and that Rushton is not the "alter ego" of Rand. Petitioners are mindful of the language of this Court and submit that this case is not only an appropriate one for judicial review but also cries out for such action to remedy a wrong.

> "Courts should be 'slow to overturn an administrative decision', *Labor Board* v. *Backcock & Wilcox Co.*, 351 U.S. 105, 112, but they are not left 'to sheer acceptance of the Board's conclusions.' *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793, 803 . . . But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co.* v. *Labor Board*, post, at 318." *N.L.R.B.* v. *Brown*, supra, at 291-292.

II. THE BOARD IMPROPERLY FOUND THAT LOCAL 51 HAD NOT WAIVED ITS RIGHT TO BARGAIN COLLECTIVELY.

At A.10-11, the Trial Examiner found that despite several phone calls from petitioner's (Rand's) counsel's secretary

requesting a copy of the new Local 51 contract, Local 51 made no contact with said petitioner until September 17, 1971, after the new operation was in effect in Boston. At A.31-32, he found that Local 51 had not thereby waived its right to bargain collectively nor was it estopped therefrom.

In view of the fact that the impending shutdown of the Rand operation was both obvious and well-known prior to April 30, 1971, and in view of the fact that Local 51 neither sought to bargain nor did it acknowledge Rand's request for a copy of the contract, it is submitted that Local 51 has waived its right to bargain collectively and is estopped therefrom.

In *N.L.R.B.* v. *Spun-Jee Corporation*, 385 F.2d 379 (2nd Cir. 1967), the circuit court faced a similar situation. The union knew of an impending shut down but never sought bargaining. It did nothing until the employer had moved to another state. The court's language at Page 384 is equally applicable to the case at bar:

> "The union's failure to request bargaining about the cessation of operations, removal, partial shutdown, subcontracting, effects of discontinuance and the transfer of employees constituted a waiver of any rights it may have had. *N.L.R.B.* v. *Columbian Enameling and Stamping Co.*, 306 U.S. 292 . . ."

For similar language see *International Ladies Garment Workers Union, AFL-CIO* v. *N.L.R.B.*, supra at 918:

> "It is well settled that when a union has sufficiently clear and timely notice of any employer's plan to relocate, close or subcontract and thereafter makes no protest or effort to bargain about the plan, it waives its right to complain that the employer acted in violation of Sections 8(a) (5) and (1)."

III. THE BOARD IMPROPERLY ORDERED REIMBURSEMENT TO EMPLOYEES OF LOCAL 50 BY PETITIONERS OF INITIATION FEES, DUES AND OTHER MONEYS WITHHELD FROM THEIR WAGES.

On A.67, the Board ordered Petitioners to reimburse the employees of Local 50 for all initiation fees, dues and other moneys withheld from their wages. Bearing in mind that there was no evidence or finding whatsoever of unlawful assistance or interference with the formation of Local 50 or in its recognition, and in fact no unlawful conduct until the return to Massachusetts (A.61), it is submitted that this portion of the Board's order is beyond its statutory power. The language in *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO* v. *N.L.R.B.*, 365 U.S. 651, 655-656 is especially pertinent:

> "Where no membership in the union was shown to be influenced or compelled by reason of any unfair practice, no 'consequences of violation' are removed by the order compelling the union to return all dues and fees collected from the members . . . The order in those circumstances becomes punitive and beyond the power of the Board . . . As Judge Pope said in *Morrison-Knudsen Co.* v. *Labor Board*, 276 F.2d 63, 76, 'reimbursing a lot of old time union men' by refunding their dues is not a remedial measure in the competence of the Board to impose, unless there is support in the evidence that their membership was induced, obtained or retained in violation of the Act."

Similarly, this Court's language in *Fibreboard Paper Products Corp. v. N.L.R.B.*, supra at 216 bears following:

> "The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' *Virginia Elec. & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540." See also in this connection,

N.L.R.B. v. Seven-Up Bottling Company of Miami, Inc., 344 U.S. 344, 346–347.

IV. THE BOARD ERRED IN FINDING THE LETTERS OFFERING REINSTATEMENT INSUFFICIENT TO TOLL BACKPAY LIABILITY.

At A.62–64, the Board concluded that the letter sent by Rushton (set forth at A.63) to all former Rand employees was insufficient to toll backpay liability, since, considered with the statements made to those who responded, they did not offer substantially equivalent employment. According to the letter,

> "This offer of employment includes all of the rights and privileges, if any, to which you might be legally entitled by virtue of your former employment, at said location, with Rand & Company, Inc." (A.63).

Each former employee who responded was told he would be paid based on Rushton's pay scale and if the Union (Local 51) prevailed in its suit, the differential in wages would be paid retroactively (A.64).

There can be no doubt but that Rushton did, in good faith, believe that it was not bound by the Local 51 agreement.

> "Certainly there were rational grounds for this contention, and, until it was resolved by the decision of the Board, the Company was justified in proceeding on the contrary assumption. . . *N.L.R.B. v. Hannaford Brothers Company*, 261 F. 2d 639, 640 (1st Cir., 1958).

That the offer of reemployment was likewise made in good faith and to toll backpay liability is equally beyond dispute. *Lakeland Bus Lines, Inc. v. N.L.R.B.*, 278 F. 2d 288, (3rd Cir. 1960). The Board, having found Rushton the "alter ego" of Rand and the work similar for employees of both companies (A.54–55), the only area of "non equivalence" was wages. And

that Petitioners agreed to rectify *retroactively* if Local 51 prevailed.

Petitioners respectfully submit that this finding of the Board, presents a novel question, is contrary to public policy and constitutes reversible error.

The Board at A.64 said,

> "An employer charged with unfair labor practices may, of course, toll backpay by offering to reinstate employees to their former positions or, if the positions are no longer available, to equivalent positions. However, he cannot do so by offering them lesser positions even if he, at the same time, assures them that they will receive in addition whatever they will be awarded as a result of litigation. Such a result would shift the risk of an employer's unfair labor practices to the wronged innocent parties, the discriminatees. Accordingly, we find that Respondents' letters to the Rand employees were ineffective to toll backpay liability."

What the Board is thus saying is that until final adjudication of an unfair labor charge by a union, an employer *at his peril* must decide whether or nor to offer reinstatement to former employees. If he so offers and is found to have originally acted improperly, his offers would have saved him from additional liability. If, on the other hand, he is proven correct in his original actions, his offers would have resulted in his having rehired employees he may not have wanted and paying them higher wages than other employees he might have.

While the employer must so gamble, the risk on the employee is minimal: If the employer offers reinstatement, the employee probably will not accept it if he can find an equal or better job. If all he can find is a lesser paying job and unless he can afford to await the outcome of litigation, he will take it.

assured that he will be put in "status quo." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 146. If jobs are not available and/or if he decides to go on unemployment for his own reasons, he can collect unemployment benefits assured that if the employer loses, his unemployment benefits will not be deducted from the award the employer will have to make because of lost backpay. *N.L.R.B. v. Gullet Gin Co.*, 340 U.S. 361.

This one-sided risk is therefore hardly fair and should not be allowed to exist. Where, as here, the employer offers employment and agrees to reimburse the accepting employee for any lost wages resulting from the difference in pay scales should the employer be found guilty of unfair labor practices, both parties then must equally share in gambling: the employer, in having an employee he may not want and a liability to pay additional wages retroactively; and the employee in having to risk losing the right to backpay if he refuses to accept the offer, regardless of the outcome of the underlying litigation. Both employer and employee would then have equally onerous decisions to make; the burden would not, as it now is, rest entirely on the employer.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review and reverse the judgment and opinion of the First Circuit.

Respectfully submitted,

Burton Peltz
300 C Street
Boston, Massachusetts 02127
Counsel for Rand & Company, Inc. and Rushton & Mercier Woodworking Co., Inc.

PETITIONERS

Of Counsel: Arthur T. Wasserman

August 16, 1974

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 73-1289.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

RUSHTON & MERCIER WOODWORKING CO., INC.
AND RAND & CO., INC.
Respondents.

Before COFFIN, *Chief Judge,*
McENTEE and CAMPBELL, *Circuit Judges.*

MEMORANDUM AND ORDER

Entered March 31, 1974

This is a petition for enforcement of a Labor Board order entered against Rand & Co., Inc. (Rand), and Rushton & Mercier Woodworking Co., Inc. of Massachusetts (Rushton), its wholly owned subsidiary. The Board found that Rand, in violation of Sections 8(a)(1) and (3) of the Act, 29 U.S.C. Sections 158(a)(1), (3) (1970), closed its Boston plant on April 30, 1971, and, after certain legal maneuvering, reopened it some

four months later under the aegis of its recently purchased subsidiary Rushton, for the purpose of eliminating an expensive union (Local 51) and replacing it with a less expensive one (District 50). Additionally, the Board found that Rand and Rushton had violated Sections 8(a)(5), (2) and (1) of the Act, by refusing, upon reopening the plant, to bargain collectively with Local 51, and instead, in recognizing District 50.

After carefully reviewing the entire record in this matter, and closely examining the findings of the Board, we must conclude that substantial evidence, taken on the record as a whole, fully supports that Board's factual determinations. Such determinations having been correctly made, the Board's legal conclusions clearly follow therefrom.*

We have considered all the Companies' explanations detailing how the old Rand operation was, without any evil motive, eventually replaced by the new Rushton firm. While we deem the evidence presented with regard thereto to be entirely plausible, it is not our function to sit as a *de novo* trier of fact. The evidence in the record, particularly the credible testimony of the witness Infantino regarding Rand's purpose in shutting down, and the unusual insistence by Rand on the "new location" provision in the collective bargaining agreement negotiated with District 50, provides ample support for the Board's determination.

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* Since we hold that substantial evidence supports the Board's finding that Rand and Rushton acted with intent to eliminate Local 51 and substitute for it a cheaper union, we have no occassion to pass upon the Board's alternative holding that since the Companies' activities were "inherently destructive of employee interests," *N.L.R.B.* v. *Great Dane Trailers*, 388 U.S. 26, 33 (1967), they would violate the Act even "without . . . proof of an underlying motive." *Id.*

We have also examined the Companies' contention that the mailing of certain letters to those former employees who were members of Local 51, offering them employment at Rushton, should operate to toll any award of back pay. However, we agree with the Board that these letters may not be fairly construed as the sort of firm offer of reinstatement to former or substantially equivalent positions to which the Local 51 members were entitled.

The Board's order is affirmed and enforced.

By the Court:

/s/ Dana H. Gallup
Clerk

A True Copy

ATTEST:

/s/ Dana H. Gallup
Clerk.

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FILED
AUG 19 1974
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–136

RUSHTON & MERCIER WOODWORKING CO., INC. & RAND & COMPANY, INC., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BURTON PELTZ
300 C Street
Boston, Massachusetts, 02127
Counsel for Rand & Company, Inc. &
Rushton & Mercier Woodworking Co., Inc.

Of Counsel: Arthur T. Wasserman

August 16, 1974

[Issued 8/25/72] [TXD–522–72
Boston, Mass.]

TRIAL EXAMINER'S DECISION

Statement of the Case

BENJAMIN K. BLACKBURN, Trial Examiner: The charge in this case was filed on September 29, 1971, [1] and amended on November 8. The complaint was issued on January 20, 1972. The hearing was held on April 11 and 12 and May 2 and 3, 1972, in Boston, Massachusetts. The complaint alleges violations of Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, as amended, growing out of events which occurred when Rand & Co. closed its woodworking shop and laid off employees represented by the Charging Party, Local 51, on April 30, and Rushton & Mercier, a wholly owned subsidiary of Rand & Co., resumed woodworking operations at the same shop with employees represented by District 50 on September 7. For the reasons set forth below, I find Respondents violated the Act as alleged.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of briefs filed by Respondents and the General Counsel, I make the following:

Findings of Fact

I. Jurisdiction

Rand & Co., a Massachusetts corporation, was engaged in Boston, prior to April 30, in the business of manufacturing store fixtures. It annually shipped products valued at more than

[1] Dates are 1971 unless otherwise specified.

*Corresponds to page 3.

$50,000 directly to customers located outside the Commonwealth of Massachusetts. Since April 30, it has remained in business as the sales agent for Rushton & Mercier and others. (The complaint contains allegations, admitted in Respondents' answers, that Rand & Co. is engaged, *"inter alia,* as a woodworking contractor in the construction industry" and "annually performs woodworking and related construction services valued in excess of $50,000 in states other than the Commonwealth of Massachusetts." There is no other indication in the record of such activity by Rand & Co.) Rushton & Mercier was incorporated on September 2 in Massahcusetts and is a wholly owned subsidiary of Rand & Co. It has been engaged since September 7 in the business of manufacturing store fixtures, using part of the plant and most of the machinery previously used by Rand & Co. It annually ships products valued at more than $50,000 directly to customers located outside the Commonwealth of Massachusetts. Respondents are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Local 51 and District 50 are labor organizations within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. *Credibility*

1. Infantino versus Burke and Fiorella

The bare bones of this case are undisputed. Rand & Co. had contracts with Local 51 for many years. On April 30, the last day of its then current contract, it laid off its employees and ceased operations. On May 1, Local 51 began a strike in the Boston area. The strike ended on May 27 when Local 51 and an association of employers agreed to a new contract. Rand & Co.

*Corresponds to pages 3-5.

subcontracted work to a firm located in Salem, New Hampshire and incorporated in that State under the name of Rushton & Mercier Woodworking Co., Inc. On June 25, Rand & Co. bought the name and good will of Rushton & Mercier (New Hampshire). Rushton & Mercier (New Hampshire) continued in business and continued to work on jobs sent to it by Rand & Co. On June 28, District 50 obtained authorization cards from all the employees of Rushton & Mercier (New Hampshire) and demanded recognition. On July 1, Rushton & Mercier (New Hampshire) recognized District 50. A contract was negotiated in July and backdated to June 28. It provided for wage rates lower than those in the contract between Local 51 and Rand & Co. which had expired on May 1 and the new contract between Local 51 and the employers' association which would have replaced it if Rand & Co. had continued operations and followed its practice of signing contracts negotiated by Local 51 and the association. On September 2 Rushton & Mercier (Massachusetts) was incorporated as a wholly owned subsidiary of Rand & Co. On September 7 it began operations in the plant previously used by Rand & Co. It recognized District 50 and adopted its contract with Rushton & Mercier (New Hampshire). It worked on the jobs which Rand & Co. had subcontracted to Rushton & Mercier (New Hampshire). All employees of Rushton & Mercier (New Hampshire), as well as two of its three owners, went to work for Rushton & Mercier (Massachusetts) on September 7. The third owner of Rushton & Mercier (New Hampshire) went into the woodworking business in Salem under a name other than Rushton & Mercier Woodworking Co., Inc.

The General Counsel claims a plot to replace an expensive union with a cheap one. Respondents claim coincidence. As more fully developed in section C, 1, below, I am not persuaded that motive is necessarily an issue in this case. However, there is

*Corresponds to page 5.

no gainsaying the conclusion that, if Respondents were motivated as the General Counsel argues they were, Respondents have obviously violated the Act. Therefore, Respondents' motive is a threshold issue.

The only direct evidence in the record of a plot is the testimony of Richard Infantino. Infantino was one of the carpenters laid off by Rand & Co. on April 30. However, unlike his fellow employees, he was transferred to the payroll of Rand Industries, a companion corporation, and continued to work until mid-June as a traveling carpenter repairing damaged fixtures in customers' stores. In the conversation in mid-April which led to this arrangement, according to Infantino, John Burke, Rand & Co.'s production manager, told him explicitly there was such a plot in the presence of Frank Fiorella, Rand & Co.'s sales manager. Burke and Fiorella denied that Burke made the statements attributed to him by Infantino.

When he was laid off for good in June, Infantino testified, Burke told him Morris Rand, president of Rand & Co. and Rushton & Mercier (Massachusetts) (and, presumably, of Rand Industries), did not want him around because Rand was afraid that Infantino's membership in Local 51 would lead to Rand having to sign a new contract with Local 51. Burke denied making this statement.

A week or so later Burke sought to recall Infantino for a special job in Detroit. Infantino at first agreed to go, but, after Burke and Fiorella had gone to some trouble to make the necessary arrangements, changed his mind.

Neither Infantino nor Burke indicated that Fiorella was present when Burke finally laid Infantino off in mid-June. On direct examination as Respondents' witness, Fiorella was not

*Corresponds to page 6.

asked about that incident. He did, however, testify about the incident when Infantino agreed to make one more trip for Rand Industries and then reneged. On cross-examination, the following exchange took place between Fiorella and counsel for the General Counsel:

Q. Let's go to Mr. Infantino. Did you have anything to do with Mr. Infantino's layoff?

A. No.

Q. Nothing at all. When Mr. Burke told you sometime—when was it in May or June of 1971—that Mr. Infantino would not be permitted or could not go to Chicago [a slip of the tongue for "Detroit"] do you remember that?

A. Yeah.

Q. When Mr. Burke told you that, did he give you the reason?

A. He mentioned something about, I think it was something about the union?

Q. What did he mention about the union?

A. I can't recall exactly what it was.

Q. Did he mention anything about Mr. Rand and the union?

A. No, Mr. Rand wasn't mentioned at all.

*Corresponds to pages 6-7.

Q. Did he mention the fact that Mr. Infantino, or words to this effect, could not go to Chicago because he was a member of Local 51?

A. I remember something like that, yeah.

Neither Burke, Infantino nor, on direct, Fiorella testified that Infantino's membership in Local 51 came up during the Detroit trip incident. Therefore, this portion of Fiorella's testimony is subject to various interpretations. Either the subject did come up at that time, as he suggests, or, what seems to me to be more likely, he suddenly remembered something Burke had said to him at the time Infantino was laid off. In either case, this testimony is clearly an admission by an official of Respondents in a position to have firsthand information that union considerations played a part in Respondents' action. I take it as confirmation of Infantino's testimony of his conversation with Burke on the day that Burke laid him off. I rely on it as my primary basis for crediting Infantino over Burke and Fiorella as to the mid-April conversation in which Burke told Infantino there was a plot as well as crediting Infantino over Burke as to the layoff conversation in mid-June.

My secondary basis for crediting Infantino over Burke grows out of an important inconsistency between Burke's testimony under rule 43b, as a witness for the General Counsel, and his testimony as a witness for Respondents. Early in the hearing, counsel for the Charging Party tried to get Burke to admit that the imminence of a carpenters' strike scheduled to begin in Boston on May 1 played some part in his scheduling work remaining in the shop for completion on April 30 with this result:

Q. Are you suggesting it was just a happy coincidence that all the employees, all 22 employees that were

*Corresponds to pages 7-8.

left were laid off on April 30th, the last day of the contract?

A. If I had come to the company a month earlier, they would have been laid off a month earlier, as the work progressed. As I got hold and saw what was happening they were laid off.

Q. So you are saying to us that it is a coincidence that that large number of employees were laid off on April 30th?

A. That is right.

Counsel for Respondents called as his first witness Arthur Wasserman, Respondents' corporate counsel, who readily conceded on cross-examination "[t]here was no coincidence at all" in the closing of Rand & Co.'s shop on April 30 and the opening of Local 51's strike on May 1. When Burke returned to the stand as a witness for Respondents, this occurred while he was on direct examination:

We calculated that the work would be out on April 30th. We made it, if you want to say we made it come out on April 30th.

TRIAL EXAMINER: I take your answer to mean, Mr. Burke, that the fact that the contract with Local 51 also expired on April 30th was pure and simple coincidence, was a fact that played no part in your planning of the work. Am I understanding you correctly?

THE WITNESS: Well, I couldn't say that a hundred percent because I was just there, and people were telling

*Corresponds to pages 8-9.

me everyday that April 30th we're going to be on strike. We are not going to be around. That kind of thing. So, naturally, we wanted to be sure that the work was done by that time, the work that we had.

Finally, two items in the record urged by Respondents as discrediting Infantino require comment. Counsel for Respondents offered the affidavit which Infantino gave to a Board investigator into evidence as a prior inconsistent statement. I received it. I find nothing in it inconsistent with the testimony which Infantino gave while on the witness stand. Both Infantino and Mario Natale, Local 51's business representative, admitted that Infantino is presently employed by the Massachusetts Transit Authority in a good job which Natale got for Infantino. I find this an insufficient basis for concluding that Infantino is biased and prejudiced against Respondents or for Local 51.

2. Natale and Bosworth versus Wasserman and Marques

There is another credibility conflict in the record which is, in my opinion, of relatively minor significance, for my conclusions of law are the same regardless of which side I credit. It involves what, if anything, happened between Local 51 and Rand & Co. when the carpenters' strike in the Boston area ended on May 27. Mario Natale, Local 51's business representative, testified that he tried several times to contact Rand & Co. to get it to sign the new contract but that his calls were never returned. Arthur Wasserman, Respondents' corporate counsel, testified that he never heard from Natale until September 17, after Rushton & Mercier (Massachusetts) began production in Rand & Co.'s old shop, and that he had his secretary call Natale's office after the strike to obtain a copy of the new area contract without success. Gloria Marques, Wasserman's secretary, testified that she made such a call to Natale's secretary.

*Corresponds to pages 9-10.

who promised to send her a copy of the contract as soon as it was available. Grace Bosworth, Natale's secretary, testified that she never received such a request. (There is no dispute that a copy of the new contract was not sent to Rand & Co.)

There is no basis, either in the record or on their demeanor, for crediting one side or discrediting the other. I do not doubt Miss Bosworth's testimony that she searched through her telephone records and found no indication of such a call from Wasserman's secretary and that she disposed of the book in which she would have recorded such a call because it filled up between the time a Labor Board investigator asked her to check it and the hearing. I do not, however, think such testimony sufficient to establish a negative since an equally possible explanation is that Miss Bosworth neglected to make a note of the call when she received it. Therefore, solely on the basis of inherent credibility, I credit Wasserman and Miss Marques over Natale and Miss Bosworth to find that Local 51 did not contact Rand & Co. between May 27 and September 17. I conclude that Rand & Co. had a low priority in Natale's busy life during this period because it was just another closed plant and he had no reason to think about it until the plant reopened.

B. *Facts*

1. **Rand & Co. Closes Its Plant**

Rand & Co. has had a collective-bargaining agreement with Local 51 for upwards of 20 years. Local 51 bargains with the Woodworking Association of Boston & Vicinity, an employers' association made up of many of the woodworking plants like Rand & Co. in the Boston area. Rand & Co. is not a member of the association. Morris Rand, the real owner of Rand & Co. (his wife is legal owner of all Rand & Co. stock), Rushton & Mercier

*Corresponds to pages 10-11.

(Massachusetts) (Rand & Co. is legal owner of all Rushton & Mercier (Massachusetts) stock), and other enterprises which bear the Rand name such as Rand Industries, joined the association for a short time in 1968 but soon dropped out. Rand & Co. has, prior to 1971, always signed the area contract negotiated by Local 51 and the Woodworking Association of Boston & Vicinity. The last such contract signed by Rand & Co. was negotiated in 1968 and was effective by its own terms through April 30, 1971. On occasion in the past Rand & Co. has sought to persuade Local 51 to accord it less expensive terms than the association had agreed to. Local 51 has taken the position that the most-favored-nation clause in the association contract precludes such concessions, and Rand & Co. has wound up signing. Bargaining for a new contract began between Local 51 and the association in early 1971. By April negotiations had reached a point where Local 51 had scheduled a strike of Boston area carpenters for May 1. The contract which was expiring provided for wages of $4.80 per hour for journeymen carpenters. The 3-year contract ultimately negotiated by Local 51 and the association after a strike lasting from May 1 through May 27 provided for wages of $5.35 per hour for journeymen carpenters from May 1, 1971, to April 30, 1972, and 65-cent-per-hour raises in each of the next 2 years.

Rand & Co. manufactured store fixtures of wood with aluminum edges. Its principal customer, prior to 1971, was the Zayre Company, a national chain of discount department stores. In the period May 1, 1968, to May 1, 1971, 72 percent of Rand & Co.'s sales were to Zayre. Sales to the Stouffer Restaurants chain and Glosser Brothers, an operation similar to Zayre, brought that figure to approximately 95 percent. For a number of years Rand & Co. was Zayre's sole supplier of store fixtures. Consequently, its operations were geared to Zayre's demands. Each fall Zayre placed an order for the miscellaneous

*Corresponds to pages 11-12.

sort of fixtures, such as checkout counters, it would need for the large number of stores it planned to open in the following calendar year. In the late winter of the following year, it placed the order for the large number of standard counters it would need for those same stores. Zayre orders ran in the hundreds of thousands of dollars. When Rand & Co. received the miscellaneous order in the fall it ordered the necessary materials and built the items Zayre would require on an essentially mass production basis. When it received the counters order after the first of the year, it did the same thing. Items produced were stored until Zayre ordered them shipped to the locations of the stores it was about to open. When they were shipped, foremen carpenters on the payroll of Rand Industries went with them to install them. (Rand Industries had no contract with Local 51. The 1968 contract between Rand & Co. and Local 51 was modified by a side agreement, memorialized in a letter from Local 51 to Rand & Co., that it would not apply outside Local 51's geographical jurisdiction, Boston and its immediate environs. Carpenters who traveled for Rand Industries actually received a higher rate of pay than that provided in the contract.) Rand & Co. used mass production techniques in the sense that products moved through four departments, i.e., the mill where wood was cut, assembly where the wood was put together, painting, and final assembly where items such as lights and trim were added, while the employees, generally, stayed in one department. Because it did not use precise milling techniques, Rand & Co.'s carpenters were required to exercise greater craft skills than would have been the case if its millwork had been more precise.

In the fall of 1969, for the first time, Rand & Co., because of its rising costs, received less than 100 percent of Zayre's order for fixtures for stores Zayre planned to open in 1970. That year Rand & Co. got half. In the fall of 1970 Rand & Co.

*Corresponds to pages 12-13.

got orders for the miscellaneous fixtures in only 10 of the 30 stores Zayre planned to open in 1971. Sometime, apparently in 1969, concern for its rising costs sent Rand & Co. to Dana Scott, Inc., efficiency experts. John Burke was a part owner of Dana Scott, Inc. Burke worked with Rand & Co. for a time and installed various programs designed to bring its costs under control. Around November 1970, when Rand & Co.'s complement of employees was 85 carpenters (i.e., employees represented by Local 51 in a craft unit) and 30 other employees and a third shift was working, Burke placed a man in the shop in an effort to reinstitute the programs he had installed earlier but which Rand & Co. had, apparently, let slide. This move notwithstanding, Rand & Co.'s costs remained high. Consequently, when it entered its bid in January 1971 for the counters portion of Zayre's 1971 order, Rand & Co.'s price was third high in a list of nine bidders. Zayre awarded the contract to the three lowest bidders. Rand & Co. learned on February 15 that it had lost the Zayre account at last, at least until it could bid on the 1972 miscellaneous order in the fall of 1971.

John Burke's personal situation sent him into the job market around this time. In March he asked Morris Rand for a job. Rand hired him to be Rand & Co.'s production manager. Burke began his new duties on April 5. At the same time Frank Fiorella, Rand & Co.'s production manager, moved over to sales manager Burke was fully conversant with the situation Rand & Co. faced as a result of its failure to get the 1971 Zayre counters contract.

Burke determined that the breakeven point for Rand & Co.'s operations was sales of $25,000 per week or, in other terms, a complement of 30 to 35 shop employees. He began scheduling the work which remained in the shop on Zayre's miscellaneous order for 1971 store openings so that it would be

*Corresponds to pages 13-14.

completed on April 30, thus avoiding problems if, in fact, the strike which was scheduled to begin on May 1 came to pass. As the operations on which they were engaged were completed, Burke laid off two carpenters on April 9, one (a temporary employee hired on March 14) on April 16, and one on April 23. By April 30, when the Zayre work was, in fact, completed, the number of Rand & Co. employees was down to 24 carpenters and 9 others.

In mid-April Burke and Fiorella told Richard Infantino, a carpenter, of the impending shutdown of the shop. They explained their tentative plan to him that while he would technically be laid off by Rand & Co. before May 1, he would be retained on Rand Industries' payroll primarily to repair damaged fixtures already in Zayre stores as complaints were received. Burke hoped, in this way, to increase Rand & Co.'s chances of getting the Zayre miscellaneous order for 1972 when Rand & Co. bid on it in the fall of 1971. In the course of this conversation, Burke told Infantino, in Infantino's words:

> The shop was going to close its doors before May 1st and that they were in some sort of deal or were in the process of dealing with a shop in New Hampshire. I was never told the name of the shop. And that there was a small crew there, five, six, eight men, and they were trying to get them down into Boston to work after Local 51 was finished, after the contract expired. That they were to come down to Boston, and they weren't so much interested in these men, you know, they weren't interested in this company, but they were more interested in getting a union in there that paid a lower rate of pay.
>
> Q. Did Mr. Burke say that to you?

*Corresponds to pages 14-15.

A. To that effect. He said that they were having trouble competing with other companies and they needed men at a different pay scale. They couldn't afford to pay Local Union 51 rates, which were then $4.80 an hour, and would have been higher after the contract.

Fiorella told Infantino, in Infantino's words:

. . . well, Frank interrupted, too, now. He didn't have much to say in the conversation but when the shop finally did reopen, and they were not sure when that was going to happen, they wanted me they used the word "management"—they wanted me to come back in the management, like as an assistant foreman or run the glass department down in back where they put the glass in the showcases and the mirrors. He wanted me to come back in some type position like that.

Q. Did he say that the plan was to keep you around until this operation resumed, is that it?

A. At that time they were not sure if I was going to be around after April 30th, but they did suggest to me that if I was laid off the chance would be that I would be called back to help again, as a sub foreman or something.

On the afternoon of April 30, Burke laid off 22 of the 24 carpenters unit employees still on the payroll and 8 of the 9 nonunit employees. The two unit employees retained were a painter and a laborer. The nonunit employee retained was a truckdriver. They were kept on the Rand & Co. payroll to take care of Zayre fixtures still in stock which had to be shipped at Zayre's orders after April 30. Rand & Co. still had approximately $500,000 worth of completed Zayre fixtures at this

*Corresponds to pages 15-16.

time. As had been planned, Infantino went on Rand Industries' payroll.

Burke laid off Infantino in mid-June. At that time, Burke told Infantino, in Infantino's words:

> Q. Can you tell us what Mr. Burke said to you during this conversation?
>
> A. That that was the day that I was definitely being laid off. No ands, ifs, or buts, I was being laid off that day. I was being released from the company and he had talked to Mr. Rand and Mr. Rand was battling about something about me being in Local 51 and he didn't want to have anything to do with me because he was afraid that with my working there he would be forced to sign a contract by having a Local 51 member there. He might be forced into signing the new contract when it came up, in the middle of May or whenever it happened.

2. Rand & Co. sends its work to Salem, New Hampshire

Rand & Co. has a second wholly-owned subsidiary named Peter Brankowitz Corp. located in Hackensack, New Jersey. Rand & Co. acquired Brankowitz, a smaller operation than Rand & Co., in the summer of 1970 by purchase. Brankowitz was also engaged in the business of manufacturing store fixtures. Its principal customer at that time was W.T. Grant, a national chain store operation. Because it feared it was losing the Zayre account, Rand & Co. sought to protect itself by getting Grant's business through Brankowitz. After Rand & Co. closed its plant on April 30, it continued to receive orders from various customers. These were small orders, running, in each

*Corresponds to pages 16-17.

case, to hundreds or thousands of dollars rather than the hundreds of thousand of dollars of Zayre orders. In the period from May through September they totaled approximately $20,000. In that period some of these orders were sent to Brankowitz. Most of them were subcontracted to Rushton & Mercier (New Hampshire), and the work was performed in Rushton & Mercier's (New Hampshire) small plant in Salem, New Hampshire.

Rushton & Mercier (New Hampshire) was incorporated by Thomas Rushton, Edward Mercier, and Clarence Hall in 1962. Rushton and Mercier owned equal interests in the business; Hall, a somewhat lesser share. All three are cabinet makers, Rushton an especially talented one. All three worked in the shop side by side with employees of the corporation. On June 25, Rushton & Mercier (New Hampshire) had two employees. On June 28 and September 7, two other significant dates, it had six. Prior to June 28, Rushton & Mercier's employees had never been represented by a union. Before Rand & Co. began subcontracting store fixtures to Rushton & Mercier (New Hampshire), its principal product was custom made kitchen cabinets.

Just when Rand & Co. first subcontracted work to Rushton & Mercier (New Hampshire) is difficult to say. (In the 3-year period prior to April 30, Rand & Co. subcontracted 5–10 percent of its work as measured in sales dollars.) John Burke did not hear of the firm until early June when Kenneth Weed, a personal friend of Thomas Rushton and a designer-draftsman for Rand & Co., suggested to Burke that Rand & Co. buy it. However, it is clear that Rand & Co. knew of it long before that, for Frank Fiorella talked to Weed about the firm and its potentials when Fiorella was production manager, prior to the hire of Burke, and Weed told Burke that he had put the

*Corresponds to pages 17-18.

firm on the list when Rand & Co. asked for bids from possible subcontractors prior to June. Also, while he was not the most precise of witnesses where dates were concerned, Thomas Rushton testified it was possible Rushton & Mercier (New Hampshire) was doing work for Rand & Co. as early as April. (I credit Burke's testimony that he first met Rushton in June over Rushton's testimony that Burke first came up to Salem in April. Rushton was a most evasive witness.) In any event, a document in evidence which lists all Rand & Co. subcontracts during May, June, July, August, and September shows an order for counters for a customer named Nugents in June as the first to Rushton & Mercier (New Hampshire) in that period.

3. Rand & Co. acquires a name and Rushton & Mercier (New Hampshire) acquires a union

While it is impossible to pinpoint the exact moment at which Rand & Co. became aware of Rushton & Mercier (New Hampshire), the record does reveal when the former acquired the name and good will of the latter. It happened on Friday, June 25.

Some 6 months before, Rushton first suggested to Weed that Rand & Co. solve his business problems by buying his company. Rushton's suggestions to Weed became more serious as time went by. Weed eventually relayed the suggestion to John Burke. Burke carried it to Morris Rand, who instructed Burke to look into the matter. Burke did so. He learned that Rushton & Mercier (New Hampshire) was in serious financial difficulties and probably would not survive for long, principally due to disagreements between Rushton and Edward Mercier. He reported his findings to Rand. Rand decided that he did not want to buy Rushton & Mercier (New Hampshire) as a going business with its outstanding debts. He decided that he could use its name and good will.

*Corresponds to pages 18-19.

Arthur Wasserman, Respondents' counsel, prepared a contract of sale. Burke carried it to Salem on June 25 and met with Rushton, Mercier, and Clarance Hall at the office of their attorney, Lewis Soule. After some dickering and a telephone conference between Soule in Salem and Wasserman in Boston, Rushton, Mercier, and Hall agreed to sell the name Rushton & Mercier Woodworking Co., Inc., and the good will of their business to Rand & Co. for $1,000. The document which Burke had brought to Salem for the conference was retyped in Soule's office to reflect the agreement finally reached. It contains the following pertinent provisions:

> 1. SELLER [i.e., Rushton & Mercier (New Hampshire)] agrees that for a period of four (4) months or more (as BUYER [i.e., Rand & Co.] may determine) from the date hereof, SELLER will conduct its business in the regular and usual course and shall manufacture such work for BUYER as BUYER may choose SELLER to manufacture for it, all such work to be performed at Seller's premises and in accordance with the terms and conditions of this Agreement [i.e., for costs plus 7-1/2 percent profit].
>
> 4. Tom Rushton, an employee of SELLER, agrees to work for BUYER or for a new corporation to be formed by BUYER utilizing the name (or any modification or variation thereof) conveyed to BUYER by this Agreement, in a capacity similar to that now served by the said Rushton or in such capacity as BUYER may request, BUYER hereby agreeing to pay him at the rate of (SEE ATTACHED SCHEDULE). Such employment shall commence upon the termination of Seller's business operation under its present corporate name or at such time as BUYER shall so request.

*Corresponds to pages 19-20.

Both were included at Rand & Co.'s insistence.

On the morning of Monday, June 28, two organizers for District 50, Domenic DiPilato and William Foley, invited all of the employees of Rushton & Mercier (New Hampshire) to lunch. Rushton, Mercier, and all six of the men employed in the shop on that day went to the 88 Restaurant in Salem at noon. They ate with DiPilato and Foley. When the meal was over, the organizers passed out District 50 authorization cards. Rushton and Mercier left the restaurant. The six employees stayed and signed the cards.

That afternoon DiPilato visited the office of Rushton & Mercier (New Hampshire). Rushton and Burke were in the office when he arrived. DiPilato demanded recognition for District 50 on the basis of the cards obtained that day. Rushton referred him to Burke. Burke looked at the cards DiPilato proffered. They came as no surprise to him because Rushton had already told him, when Rushton and Mercier returned from lunch, about the meeting at the restaurant. Burke did not give DiPilato an immediate answer. DiPilato left a recognition agreement form with Burke.

Burke carried the recognition agreement form back to Boston. He conferred with Rand and Fiorella about what to do. They decided that Rushton & Mercier (New Hampshire) should recognize District 50. Burke returned to Salem and told Rushton it was all right to recognize District 50. Rushton and Mercier signed the agreement on July 1 on behalf of Rushton & Mercier (New Hampshire).

Burke acted as sole negotiator for Rushton & Mercier (New Hampshire) in negotiations with District 50 which followed. Negotiations were held on July 1, 5, 6, 14, and 19

*Corresponds to pages 20-21.

and August 3. Agreement was reached on a 3-year contract which was backdated to June 28 and signed by Rushton and Mercier on behalf of Rushton & Mercier (New Hampshire). The contract provided for various grades in various job classifications. The highest nonsupervisory wage rate during the first year of the contract was $4 an hour for millman 1. (Working foreman 1 got $5; working foreman 2 got $4.50) The lowest was $2 for laborer 2. The contract called for 30 cents an hour raises across-the-board in each of the 2d and 3d years. Article I "Recognition" reads:

> THE COMPANY RECOGNIZES THE UNION AS THE SOLE AND EXCLUSIVE COLLECTIVE BARGAINING AGENT FOR THE PURPOSES OF COLLECTIVE BARGAINING IN REGARDS TO WAGES, HOURS, AND OTHER TERMS AND CONDITIONS OF EMPLOYMENT FOR ALL PRODUCTION EMPLOYEES, INCLUDING WORKING FOREMAN, MAINTENANCE EMPLOYEES, TRUCK DRIVERS, SHIPPERS AND LABORERS, BUT EXCLUDING EXECUTIVES, SUPERVISORY EMPLOYEES, PRESENTLY RETIRED EMPLOYEES AS OF EFFECTIVE DATE OF THIS FIRST CONTRACT, OFFICE EMPLOYEES; PROVIDED FURTHER, THAT SUCH RECOGNITION IS LIMITED TO EMPLOYEES IN THE COMPANY'S PLANT AT SALEM DEPOT, NEW HAMPSHIRE, OR ANY SUBSEQUENT OR NEW LOCATION OF THIS PLANT.

The latter phrase was included at the Company's suggestion.

4. Rand & Co. brings its work back to Boston

All the work turned out by Rushton & Mercier (New Hampshire) during June, July, and August was work sub-

*Corresponds to pages 21-22.

contracted to it by Rand & Co. Around the first of August Burke informed Rushton that the work was going to be returned to Boston in the near future. To that end, Rushton & Mercier (Massachusetts) was incorporated in Massachusetts on September 2, under the name of Rushton & Mercier Woodworking Co., Inc., as a wholly owned subsidiary of Rand & Co. to carry on the business of a manufacturer of store fixtures. Morris Rand became its president, treasurer, and one of its directors. The other two directors are Frank Fiorella and John Burke. It was capitalized at $100,000, comprised entirely of machinery and other assets of Rand & Co. It leased the basement and third floor and part of the second floor of the premises in which Rand & Co. conducted its manufacturing operations prior to April 30.

Rushton visited Boston during the week before Labor Day to prepare for the move from Salem to Boston. On August 28, Burke conferred with DiPilato about the move and agreed to recognize District 50 as the representative of the employees of Rushton & Mercier (Massachusetts) and apply District 50's contract with Rushton & Mercier (New Hampshire) to them after the move. Beginning on Tuesday, September 7, the day after Labor Day, Rushton & Mercier (Massachusetts) began operations with Rushton, Hall, and all six of the Rushton & Mercier (New Hampshire) employees. Of the men working in the Salem plant just prior to Labor Day, only Mercier failed to report for work in Boston. He continued to operate a woodworking business in the Salem plant in his own name until December when the building was sold as part of the liquidation of Rushton & Mercier (New Hampshire). Rushton & Mercier (New Hampshire) still exists as a New Hampshire corporate entity. It has no assets and is engaged in no business activities.

Rushton & Mercier (Massachusetts) applied the District 50 contract to its employees from the beginning of its operations

*Corresponds to pages 22-23.

as agreed with District 50. Rushton is production supervisor. Maurice Marquis, one of the six Rushton & Mercier (New Hampshire) employees who made the move to Boston, is working as foreman. Hall and the other five became rank-and-file employees.

Soon after it began production in Boston, Rushton & Mercier (Massachusetts) began to expand its work force. It placed ads in newspapers a day or two after September 7. It did not attempt to contact through Local 51 any of the carpenters laid off by Rand & Co. When several men in the latter category came to the plant, they were offered jobs as new employees at the rates specified in the District 50 contract. By mid-October, Rushton & Mercier (Massachusetts) had expanded its work force to approximately 20 employees.

Among the four or five former Rand & Co. employees who were hired by Rushton & Mercier (Massachusetts) in September were Frank Tino and Pasquale Colacetti. All the men in this group were offered a wage rate, as new employees, commensurate with where their skills placed them, in Rushton's judgement, in the job classifications and grades specified in District 50's contract. The highest rate offered to any applicant, including some former Rand & Co. employees who did not accept, was $4 an hour.

A few days after Tino and Colacetti were hired, Rushton gave them a number of forms to be filled out. Among them was a form authorizing the Company to deduct dues from their wages for District 50. Tino and Colacetti protested. Rushton told them they had to sign in order to work for Rushton & Mercier (Massachusetts). Tino and Colacetti quit rather than sign.

*Corresponds to pages 23-24.

On September 17 Mario Natale, business representative of Local 51, discovered that production had resumed in Rand & Co.'s old plant. He telephoned Rand & Co. that day and wound up talking to Wasserman. Wasserman denied that Rand & Co. had reopened its plant. Natale visited the plant and talked to several Local 51 members who were working there. He told them they were working in a plant which Local 51 considered unfair and joining District 50 would make them liable for charges of dual unionism under the constitution of the Carpenters union. One employee in this category, Robert Cunio, received a letter from Natale dated October 1 warning him that charges would be preferred against him if he continued to work for Rushton & Mercier (Massachusetts). Cunio also received a letter dated November 8 informing him that charges had been preferred against him and that a trial board would consider the matter on November 18. The record does not indicate what, if anything, happened on or after November 18.

A former Rand & Co. employee named James Capobianco accepted Rushton's job offer but did not report to work as arranged. He informed the Company he had changed his mind because Natale had told him not to go to work for Rushton & Mercier (Massachusetts).

After the charge in this case was filed on September 29, letters offering employment by Rushton & Mercier (Massachusetts) "in the manufacturing operations at its plant located at 300 C Street, South Boston, the location of the plant formerly operated by Rand & Company, Inc." with "all the rights and privileges, if any, to which you might be legally entitled by virtue of your former employment, at said location, with Rand & Company, Inc." These letters were first sent to a group of 11 former employees of Rand & Co. on October 26, then to a group of 7 on November 26, and finally to a group of 10 on March 17, 1972.

*Corresponds to pages 24-25.

Despite the best efforts of Frank Fiorella, its sales manager, Rand & Co. has been unable to land any contracts similar to the contracts it used to receive from Zayre. Consequently, all the work performed by Rushton & Mercier (Massachusetts) since September 7 has been similar to the subcontracts performed by Rushton & Mercier (New Hampshire) for Rand & Co. before Rand & Co. brought its work back to Boston. In other words, Rushton & Mercier (Massachusetts) has been producing small custom orders rather than large mass production orders for store fixtures. As a result, the operations of Rushton & Mercier (Massachusetts) now are not identical with the operations of Rand & Co. then. In the first place, in order to improve its product line, Rushton & Mercier (Massachusetts) has switched to a style of fixtures in which wood is inserted into a stainless steel frame. Also, greater skill and care are used in milling operations so that relatively less skill is required of the carpenters who assemble the fixtures. In addition, the operations now are not departmentalized to the same degree they were under Rand & Co. so that individual carpenters tend to work on individual fixtures throughout the production process rather than tend to work on one operation only. Finally, while Rushton & Mercier (Massachusetts) is using only tools and equipment formerly used by Rand & Co. (the tools and equipment belonging to Rushton & Mercier (New Hampshire) are still in Salem in the possession of Edward Mercier), it is not using one large piece of machinery called a double-end tenoner formerly used by Rand & Co. because it is only suitable for a mass production operation.

C. Analysis and Conclusions

1. Motive

No matter how the record is viewed with respect to this threshold issue, the result always comes out against Respon-

*Corresponds to pages 25-26.

dents. Of course, my crediting of Richard Infantino's testimony that John Burke, in effect, told him in April that Rand & Co. was going to get rid of Local 51 and its expensive contract through the Rushton & Mercier subterfuge disposes of the matter without more. Even if the record did not contain this evidence, I would draw the same conclusion from the record as a whole because the chain of coincidences relied on by Respondents is too long to be credible. I can swallow one coincidence, and sometimes two, without having my credulity put to the test, but a causeless chain of events in which an organized company in financial trouble just happens to send work to a small, unorganized company in a neighboring State, then just happens to purchase the name and good will of that company, then just happens to direct that company to recognize a union which has just happened to appear on the scene and organize its employees, then just happens to negotiate a contract for that company with that union which contains wage rates substantially lower than it would have to pay its old employees, and then just happens to reopen its own shop under the name acquired from that other company, utilizing that other company's employees and the lower wage rates permitted by its contract with that union, does not square with any experience I have ever lived through.

Respondents place much emphasis on the fact that Burke did not meet Thomas Rushton until June. I have already set forth in detail my reasons for crediting Infantino over Burke on their crucial conversations. I have not, however, discredited Burke generally for, with respect to his first meeting with Rushton as well as many of the other facts set forth above, I have relied on his testimony. The fact that Burke did not meet Rushton until June does not preclude a finding that the plan to get rid of Local 51 had its genesis even before the April 30 relationship between Kenneth Weed and Rushton that Rand &

*Corresponds to pages 26-27.

Co. was aware of the existence of Rushton & Mercier (New Hampshire) and the possibilities it offered long before April 30. Moreover, the fact that I found Burke to be a generally credible witness avails Respondents nothing insofar as his assertions that he was not discriminatorily motiviated are concerned. Put most charitably, Burke's role was that of a dupe. His motive is irrelevant. The motive that is controlling in the decision of this case is Morris Rand's since all the final decisions as to what Rand & Co. did were made by him. Rand was not called as a witness by Respondents. I have given that fact due weight in concluding that the record requires a finding Rand & Co. acted pursuant to a plan to get rid of Local 51 and its expensive contract even absent the testimony of Infantino.

This finding disposes of another issue which sharply divides the parties. The General Counsel argues that Rushton & Mercier (Massachusetts) is either a single, integrated employer with Rand & Co. or Rand & Co.'s alter ego. Respondents argue that Rushton & Mercier (Massachusetts) is the successor to Rushton & Mercier (New Hampshire). Since Rushton & Mercier (Massachusetts) came into existence as part of Rand & Co.'s efforts to continue in the business of manufacturing store fixtures without the burden of Local 51 on its back, I find it is Rand & Co.'s alter ego. Therefore, the successorship cases, relied on by counsel for Respondents in his brief such as *Randolph Rubber Co., Inc.*, 152 NLRB 496, are not germane to the situation persented in this case.

I would carry the discussion of Respondents' motive one step further. Even if the record did not contain Infantino's credited testimony and I could accept Respondents' assertions that no purpose to rid itself of Local 51 underlay its actions, I would still find that Respondents had violated Section 8(a)(3) of the Act by discriminating against Rand & Co.'s employees. I

*Corresponds to pages 27-28.

would do so on the basis of the rationale expressed by the Supreme Court in *Radio Officers' Union of the Commercial Telegraphers Union, AFL [A.H. Bull Steamship Company]*, v. *N.L.R.B.*, 347 U.S. 17, that "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership." I recognize the fact, as pointed out in Respondent's brief, that cases in which this principle has been applied such as *Radio Officers, supra, Erie Resistor Corp.* v. *N.L.R.B.*, 373 U.S. 221, and *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, involve discriminations between groups of employees admittedly predicated on their status as union members or strikers on the one hand or their status as nonunion employees or nonstrikers on the other. They are not, therefore, on all fours with this case. Nonetheless, even if Respondents' had been motivated solely by economic considerations as they claim, I can imagine no course of conduct more inherently tending to discourage membership in Local 51 than the one Rand & Co. set in motion on April 30 when it laid off employees earning $4.80 an hour and represented by Local 51 and Rushton & Mercier (Massachusetts), its alter ego, concluded on September 7 when it resumed operations with a new group of employees earning $4 an hour and represented by District 50. Being represented by Local 51 cost Rand & Co.'s employees their jobs. In the few cases of men who were willing to sacrifice their representation by Local 51 in order to return to work with Rushton & Mercier (Massachusetts), the price exacted from them was the difference between $4 an hour and $5.35 an hour, the journeymen rate in Local 51's poststrike contract.

2. Respondents' other defenses

Lack of discriminatory motive and the criteria for enforcing bargaining relationships in successorship situations are the two main facets of Respondents' defense. A third is their

*Corresponds to pages 28-29.

contention that Local 51 has no right to the work now being performed by Rushton & Mercier (Massachusetts) because it is different from the work performed by Rand & Co. In summary, it stresses the difference between the latter's essentially mass-production operation and the former's essentially custom-made operation.

I have found that there are, in fact, the differences between the two operations which Respondents rely on. I have also found, however, that products produced by Rushton & Mercier (Massachusetts) are essentially the same as those produced by Rand & Co.–store fixtures–made out of essentially the same material–wood–requiring essentially the skills of the same sort of employees–carpenters–performing essentially the same tasks–milling and assembling wood. The latter finding outweighs the former to the point that Respondent's argument verges on hairsplitting. I find no merit in it.

Implicit in this argument is a contention that the fact District 50 represents a production and maintenance unit (i.e., all employees other than the usual exceptions under Board law) makes inappropriate a craft unit of the employees of Rushton & Mercier (Massachusetts) such as Local 51 represented at Rand & Co. While the point is not stressed in Respondents' brief, it is alluded to in this paragraph which bridges their successorship argument and their type-of-work argument:

> The Rand employees represented by Local 51 were semi-skilled carpenters performing functions in an assembly-line, departmentalized operation. Together they constituted a so-called "craft unit". The so-called "laborers", the assemblers (to a great extent), the painters, etc. were not included. On the other hand, the R & M (Mass.) shop has employees all working together in a looser structure, some highly-skilled, most not skilled at all.

*Corresponds to pages 29-30.

Together they all constitute the broad-based "production and maintenance" type of unit: that established at R & M (N.H.) and contracted for by District 50 on that basis. In what respect, then, could the claim of Local 51 be superior to that of District 50?

The same answer applies to this question. A craft unit was appropriate at Rand & Co. for upwards of 20 years, as the bargaining history between Rand & Co. and Local 51 attests. The similarities between operations at Rand & Co. and operations at Rushton & Mercier (Massachusetts) far outweight the differences. Therefore, the fact that District 50's production and maintenance unit may also be an appropriate unit does not make a craft unit inappropriate at Rushton & Mercier (Massachusetts).

The final arguments advanced by Respondents as to the merits of this case go to its Section 8(a)(5) aspects. One is that Local 51 has waived its bargaining rights because it did not request bargaining between April 30 and September 17. The other is that Local 51 is estopped from asserting those rights under the rationale of such cases as *Spun-Jee Corp.*, 171 NLRB 557, because it would have taken a take-it-or-leave-it attitude on the new contract, as it had in the past, thus creating an immediate impasse and relieving Respondents of any further obligation to bargain.

As to Respondents' waiver theory, Natale's telephone call to Wasserman on September 17 to inquire what was going on at the shop was made as soon as Natale discovered that the shop was no longer closed. A formal request to bargain while the shop was closed would have served no useful purpose and was, therefore, not required of Local 51 in order to protect its right to request bargaining when the shop reopened. The words

*Corresponds to pages 30-31.

spoken between Natale and Wasserman on September 17, while not couched in technical terms, were sufficient in law to constitute a request by Local 51 and a refusal by Respondents. Therefore, Local 51 has not waived its rights by Natale's failure to seek Rand & Co.'s signature to the new area contract immediately after that contract came into existence.

As to Respondent's estoppel theory, the bargaining history between Rand & Co. and Local 51 precludes a finding that an impasse would have resulted if Natale had presented the new area contract and refused to soften its terms for Rand & Co.'s benefit. Each time this happened in the past, no impasse resulted. Rather, each time Rand & Co. accepted the area contract. There is no reason to think that the same thing would not have happened in 1971 if the events of this case had not intervened. Moreover, the basic finding of this decision that Respondents were discriminatorily motivated in those events precludes a finding that Respondents innocently altered their position to their detriment in good-faith reliance on Local 51's conduct prior to 1971 or between April 30 and September 17, 1971.

3. Respondents' violations

a. *Section 8(a)(3) and (5)*

The General Counsel contends that Respondents violated Section 8(a)(3) and (5) of the Act by their entire course of conduct, beginning with the layoff of April 30. I have found, on the basis of Burke's statements to Infantino prior to that date, that Respondents acted from the outset pursuant to a plan to replace Local 51 with a less expensive union. Therefore, despite the fact that Respondents also had strong economic reasons for what they did, they acted pursuant to a reason discriminatory within the meaning of the Act. Even if Respondents are

*Corresponds to pages 31-32.

credited with acting on the basis of economic considerations also so that the analysis is couched in terms of mixed motive, the discriminatory element is substantial. Thus the controlling factor in determining whether Respondents violated Section 8(a)(3) of the Act and an important, although not essential, element in determining whether they violated Section 8(a)(5) is the fact that their motive was illegal. Even if, as counsel for the General Counsel is willing to concede, "all of" Respondents' "activities might well have been an independent and unrelated series of fortuitous events of which full advantage was taken by" Respondents so that Burke's words are interpreted not as revealing a plan already complete in every detail by mid-April but merely an objective on which Respondents had set their sights, the result is the same. When Respondents took the first step on the path which culminated on September 7 by laying off all Rand & Co.'s employees and closing its shop on April 30, their purpose was already formed. That first step rendered their actions thereafter illegal even if the details of the plan were worked out step-by-step as the situation developed.

The fact that Rand & Co. subcontracted work of the sort sent to Rushton & Mercier (New Hampshire) to Peter Brankowitz Corp., Rand & Co.'s other wholly owned subsidiary, and other companies without advising or bargaining with Local 51 is of no significance. In all of those instances Rand & Co. was motivated solely by economic considerations. In fact, another local of the Carpenters union represents Brankowitz employees. (The record does not reveal their wage rates.)

Respondents' argument that the ability of Rand & Co.'s employees to perform the work now being done by Rushton & Mercier (Massachusetts) is a fact not established is not well taken. The fact that Rushton & Mercier (Massachusetts) is making store fixtures in Rand & Co.'s shop with Rand & Co.'s

*Corresponds to pages 32-33.

tools is sufficient to establish that the men who used to make store fixtures in that shop with those tools could do so now notwithstanding the change in the Employer's name.

I find, therefore, that Respondents discriminated against their employees within the meaning of Section 8(a)(3) of the Act and refused to bargain collectively with Local 51, the representative of some of those employees, within the meaning of Section 8(a)(5) of the Act when Rand & Co. laid off all its employees on April 30, thereafter subcontracted work to Rushton & Mercier (New Hampshire) without first advising Local 51, and brought Rushton & Mercier (Massachusetts) into existence and recognized District 50 as the representative of its employees in violation of Section 8(a)(2) of the Act.

b. *Section 8(a)(2)*

At the hearing, the General Counsel rested on April 12, 1972. When the hearing reconvened on May 2, 1971, and before Respondents began presenting their defense, counsel for District 50 withdrew after stating:

> I am so satisfied that the evidence which General Counsel has presented just simply does not sustain the assertions that it has made in the complaint that I do not intend to offer any evidence as to the asserted unlawful assistance which is the only area of this complaint and proceeding in which I have any substantial interest from my viewpoint.

In their brief Respondents take the same position, thus:

> *Respondents Have No Bargaining Obligation To Local 51, Because R & M (Mass.) Is Not The "Alter Ego" of Rand & Co. But Is The "Successor" To R & M (N.H.), And*

*Corresponds to pages 33-34.

Accordingly Had To Adopt The Contract of R & M (N.H.), Absent Any Finding of 8(a)(2) Violation By R & M (N.H.)

General Counsel had the burden of establishing unlawful recognition, which he said he would but did not on this record. The only evidence General Counsel adduced bearing at all on this point is found in the testimony of Thomas Rushton (170 177). As noted at pp. 14 and 15 of this Brief, the state of the evidence is that all of the employees of R & M (N.H.) attended a meeting at a cafe at which District 50 organizers, following a luncheon, convinced them to sign cards. Messrs. Rushton and Mercier went to the cafe, had lunch, but left as soon as they realized the purpose of the post-luncheon meeting. Rushton testified that he "knew something was up", and so he went along to the cafe, but that he left as soon as he found out what was going on.

Suspicious? Perhaps. But there is not a scintilla of evidence that Rushton arranged this meeting, or any evidence to rebut his testimony that he didn't know the purpose of his employees' meeting. General Counsel called one of the employees in attendance, Marquis, but he did not testify that Rushton or any management person urged or advised him to attend (286).

How was it that this meeting was called then? Who can say? Perhaps the R & M (N.H.) employees called in union representatives out of some fear of what they thought would happen as the result of the Agreement executed between Rand and their employer a few days before, which they might have construed as a purchase and sale.

*Corresponds to pages 34-35.

But why speculate? The burden of coming forth with *evidence* of unlawful assistance rested with General Counsel. But he established *nothing*. It was not up to Respondents to justify the recognition, other than to prove that a check of the cards presumably secured at this meeting was conducted, which Respondents' witnesses did. The "tainted" nature of the cards which General Counsel promised in his opening remarks to establish was not established. General Counsel could have called other employees who attended the meeting. He could have called the District 50 representatives. But he did not, and, proof of this was his burden.

All he managed to show was the fact of a very limited presence of Rushton, as well as his partner Mercier. But this will not suffice to establish the claimed violation. Management presence alone is not sufficient. See *Coamo Knitting Mills*, 150 NLRB 579. There must be proof of the Employer's having contacted the union, arranging the meeting, allowing the union use of plant facilities, etc. Compare *Kellers Ladders Southern*, 161 NLRB 21. The record evidence falls far short of this. Evidence of the violation alleged was simply not established.

Respondents' brief summarizes the record with reasonable accuracy. Thomas Rushton, an evasive witness, did try to leave the impression that he and Edward Mercier went to lunch with Domenic DiPilato and William Foley, District 50's organizers, on June 28 with no advance knowledge of DiPilato's and Foley's purpose in entertaining all the employees of Rushton & Mercier (New Hampshire), that organization of the shop did not come up until after the meal was over, and that he and Mercier beat a hasty retreat the moment authorization cards appeared and they realized what was going on. However, the following

*Corresponds to pages 35-36.

excerpts from his testimony show that his role that day was not quite as innocent as he claimed:

Q. As soon as the employees got there and as soon as you got there, Mr. Foley and/or Mr. DiPilato introduced themselves as union representatives, didn't they?

A. I don't think so, no. I have thought about this question, you know, let's face it. I knew it was coming, and I don't believe they did, yet, if it makes any difference.

Q. When was the first time to your recollection that they made themselves known to you as union representatives?

A. During the course of the meal.

Q. Early in the course of the meal?

A. Well, yes.

Q. Almost as you sat down and the meal was served, right?

A. Well, we got sat down and I might have asked someone, "Who are these guys?" or something like that.

Q. So you knew throughout the entire meal that they were union representatives?

A. Yes, not throughout the whole meal, but pretty close, yes.

*Corresponds to pages 36-37.

Q. Did you have any conversation either that day or some days before the day of the meeting at the 88 Restaurant with Mr. Burke about the District 50 people talking to your employees?

A. I don't think so.

Q. Do you remember or don't you remember?

A. I have to say I don't remember, but I don't think so.

Q. It is possible that you did, is that it?

A. I would have to say no. I, myself, I think I had an inkling what this meeting was at the last minute, but I don't remember having any advance notice of it.

Q. Where did you get your inkling from, Mr. Rushton?

A. I don't know, just second guessing, I guess.

Q. Second guessing what?

A. They were having a meeting.

Q. Does that mean union? Is that what you are telling us?

A. I would have to say yes. When they were having that meeting and when we got over there, I said to myself, well, this is possible, you know. In other words when I walked in I wasn't that surprised that it was a union

*Corresponds to pages 37-38.

meeting, but I wasn't that sure either. It could have been an insurance man, I don't know, as I recall.

Maurice Marquis, a frightened man, almost gave the game away when he testified:

Q. (By Mr. Zankel) After reading paragraph 12 of that document I handed you [the witness' affidavit] do you now recall whether it was Mr. Mercier or Mr. Rushton who asked you to go to that meeting at the 88?

A. No, I don't recall.

Q. Was it either one of them?

A. It could have been.

As with Respondents' chain of coincidences, I find Rushton's and Marquis' account of the June 28 luncheon hard to swallow. But it is true that they were the only witnesses called by the General Counsel to testify about that episode. If I discredited them, there would be no basis for any findings of fact about it. Therefore, I have not discredited them but have limited my findings to those set forth in the section entitled "Facts" above. It is true, as counsel for Respondents points out, that there is no direct evidence in the record that Rushton (or, for that matter, anybody else) arranged the meeting. Since DiPilato and Foley were never called to the stand by any party, the answer to counsel's perceptive question—"How was it that this meeting was called then?" must forever remain a mystery.

The trouble with Respondents' argument that no finding of a Section 8(a)(2) violation is possible on this record is, as indicated by the headnote to the section of their brief in which

*Corresponds to pages 38-39.

their Section 8(a)(2) argument appears, that they have misconstrued the complaint. There is no allegation that Rushton & Mercier (New Hampshire) has violated the Act. In fact, Rushton & Mercier (New Hampshire) is not even a party to this proceeding. The allegation is that Respondents, that is, Rand & Co. and Rushton & Mercier (Massachusetts), have assisted District 50 in the course of a series of events which resulted in Respondents replacing a union they found too expensive with one they found acceptable. In that posture, the evidence which bears on the Section 8(a)(2) issue is much more than merely the evidence of what happened at the 88 Restaurant on June 28, and the case relied on by Respondents, *Coamo Knitting Mills*, 150 NLRB 579, is inapposite. In *Coamo* the employer permitted a union to solicit its employees on company property but on their own time (for all but 5 of 170 employees) while a company representative was present. The Board found that these facts did not add up to a violation of Section 8(a)(2). Here the additional facts which weigh against Respondents are legion. June 28 was only a weekend after Rand & Co.'s purchase of the Rushton & Mercier name. Rushton bucked the problem of what to do to Burke when DiPilato walked through the office door and demanded recognition. The look which Burke gave to the authorization cards signed by the six employees who had so recently lunched with Rushton and Mercier, DiPilato and Foley was cursory at best. Burke, the dupe, bucked the problem to Morris Rand, who decided that Rushton & Mercier (New Hampshire), a company whose name and good will he had just acquired but which was specifically required to continue in business on its own under the terms of the deal, would recognize District 50 without more. Burke, not Rushton or Mercier, negotiated with District 50. Shortly after September 7, Rushton, by then a supervisor for Rushton & Mercier (Massachusetts), told two newly hired employees, Frank Tino and Pasquale Colacetti, that they had to sign

*Corresponds to pages 39-40.

immediately an authorization for deduction of District 50 dues from their wages. Above all, there was a plan. Here, as in the Section 8(a)(5) aspect of this case, while the finding that Respondents were discriminatorily motivated is not essential to a finding that they violated Section 8(a)(2), it dictates that finding. Therefore, I find Respondents contributed assistance and support to District 50 as the representative of the employees of Rushton & Mercier (Massachusetts) as proscribed by Section 8(a)(2) of the Act.

Upon the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. Rushton & Mercier Woodworking Co., Inc., and Rand & Co., Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 51, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, and International Union of District 50, Allied and Technical Workers of the United States and Canada, and its Local Union 13974, are labor organizations within the meaning of Section 2(5) of the Act.

3. All journeymen and apprentice carpenters employed by Respondents or either of them, excluding all other employees, are a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times relevant to this case, Local 51 has been and is now the representative for the purpose of collective bargaining of the employees in the unit described above within the meaning of Section 9(a) of the Act.

*Corresponds to pages 40-41.

5. By laying off Rand & Co.'s employees and closing its shop on April 30, 1971, by thereafter subcontracting work to Rushton & Mercier (New Hampshire) in Salem, by purchasing the name and good will of Rushton & Mercier (New Hampshire) on June 25, 1971, by having Rushton & Mercier (New Hampshire) recognize District 50 on June 28, 1971, by thereafter negotiating a contract made effective June 28, 1971, with District 50 on behalf of Rushton & Mercier (New Hampshire), by incorporating Rushton & Mercier (Massachusetts) on September 2, 1971, by resuming production in Boston on September 7, 1971, with the former employees of Rushton & Mercier (New Hampshire), by applying the terms of District 50's agreement with Rushton & Mercier (New Hampshire) to their operations in Boston thereafter, and by threatening newly hired employees of Rushton & Mercier (Massachusetts) with discharge for refusing to join District 50, all without notice to or bargaining with Local 51 and all with the purpose of reducing their labor costs by replacing Local 51 as the respresentative of their employees with District 50, Respondents have violated Section 8(a)(1), (2), (3) and (5) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

In order to effectuate the policies of the Act, it is necessary that Respondents be ordered to cease and desist from the unfair labor practices found and remedy them. Respondents' violations of Section 8(a)(2) of the Act require an order that they withdraw and withhold recognition from District 50 as the representative of their employees and cease giving effect

*Corresponds to pages 41-42.

to District 50's agreement with Rushton & Mercier (Massachusetts) unless and until such time as District 50 is certified by the National Labor Relations Board, and that they reimburse employees for any initiation fees, dues, or other moneys withheld from their wages for the benefit of District 50, with interest at 6 percent per annum as prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716. Respondents' violations of Section 8(a)(5) require an order that they recognize and bargain with Local 51 and, if an understanding is reached, embody such understanding in a signed agreement.

Respondents' violations of Section 8(a)(3) require an order that they undo the effects of the discrimination against Rand & Co.'s employees. The General Counsel takes the position that only employees represented by Local 51 should be included in such a remedy, and a list of such employees has been included in the record so that the order can list by name all discriminatees to be made whole. However, such a remedy would be too narrow, for both unit and nonunit employees were laid off by Rand & Co. on April 30 pursuant to its plan. Nonunit employees are thus as much victims of Respondents' discrimination as unit employees and must be included. Since there is no comparable list of nonunit employees in the record, I shall not attempt to list discriminatees by name in my recommended Order but shall leave that determination to the compliance stage.

Respondents contend that no backpay should be awarded, relying on the economic situation in which Rand & Co. found itself on April 30. Respondents' argument is based on its position that the April 30 layoff was motivated solely by economic considerations. Since I have found that the layoff was illegally motivated, at least in substantial part, there is no merit

*Corresponds to pages 42-43.

in Respondents' position that no backpay is called for. However, I have also found that the economic facts at that time were as Respondents represented them. Absent a discriminatory motive, Rand & Co. might well have closed its shop and laid off all its employees for a time on April 30. When it would have reopened and with how many employees under those circumstances is speculative. The only thing that can be said with certainty now is that the measure of the work which would have been available to Rand & Co.'s employees is the work which was subcontracted to Rushton & Mercier (New Hampshire) between May 27, when the Carpenters strike in the Boston area ended, and September 7 and the work performed by Rushton & Mercier (Massachusetts) since September 7. Therefore, insofar as a reinstatement remedy is concerned, I shall recommend that Respondents order immediate reinstatement to as many of the Rand & Co. employees laid off on April 30 as Rushton & Mercier (Massachusetts) now needs, discharging present employees not in that group, if necessary, to make room for them and that it place on a preferential hiring list the names of any employees laid off on April 30 who cannot be used immediately by Rushton & Mercier (Massachusetts). Which employees shall be offered immediate reinstatement and which shall be placed on the preferential hiring list can also be determined in the compliance stage, as well as whether Respondents' letters of October 26 and November 26, 1971, and March 17, 1972, were valid offers of reinstatement to some discriminatees. Insofar as a backpay remedy is concerned, I shall simply recommend that employees discriminated against be made whole. Once again, the amount due each, including interest at 6 percent per annum computed in the same manner as interest on initiation fees, dues, and other moneys withheld for the benefit of District 50, can be determined under the criteria indicated here in the compliance stage.

*Corresponds to pages 43-44.

Since the violations by Respondents which I have found deliberately denied to Rand & Co.'s employees the right to be represented by a representative of their own choosing, a right which lies at the heart of the Act. I shall recommend a broad rather than a narrow order.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[2]

ORDER

Rushton & Mercier Woodworking Co., Inc., and Rand & Co., Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Contributing assistance or support to International Union of District 50, Allied and Technical Workers of the United States and Canada, and its Local Union 13974, or any other labor organization as the collective-bargaining representative of their employees.

(b) Refusing to recognize and bargain with Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive collective-bargaining representative of their employees in the unit found appropriate herein.

2 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

*Corresponds to pages 44-45.

(c) Unilaterally changing the terms and conditions of the employment of its represented employees, including subcontracting unit work, without bargaining with their representative.

(d) Laying off their employees and closing their plant in order to get rid of an incumbent labor organization and replace it with another, thereby discouraging membership in Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

(e) In any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Withdraw and withhold recognition from International Union of District 50, Allied and Technical Workers of the United States and Canada, and its Local Union 13974, and cease giving effect to the collective-bargaining agreement of Rushton & Mercier Woodworking Co., Inc., with those labor organizations unless and until such time as at least one of them is certified by the National Labor Relations Board.

(b) Reimburse present and former employees for any initiation fees, dues, or other moneys withheld from their wages for the benefit of International Union of District 50, Allied and Technical Workers of the United States and Canada, and its

*Corresponds to pages 45-46.

Local Union 13974, with interest at 6 percent per annum.

(c) Upon request, bargain collectively with Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive representative of the employees in the unit found appropriate herein and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Offer to employees of Rand & Co., Inc., who were laid off on April 30, 1971, in such numbers as are presently required by Rushton & Mercier Woodworking Co., Inc., to operate their plant, discharging, if necessary, other employees of Rushton & Mercier Woodworking Co., Inc., immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(e) Place the names of any employees of Rand & Co., Inc., laid off on April 30, 1971, who are not offered immediate and full reinstatement pursuant to this Order on a preferential hiring list and offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, as vacancies occur.

(f) Make whole the employees of Rand & Co., Inc., who were laid off on April 30, 1971, for any earnings they lost as a result of the discrimination against them, plus 6 percent interest.

*Corresponds to page 46.

(g) Notify immediately any employees of Rand & Co., Inc., laid off on April 30, 1971, who are presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(h) Post at their plant in Boston, Massachusetts, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondents' authorized representative, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director for Region 1, in writing, within 20 days from the date of the

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

*Corresponds to pages 46-47.

receipt of this Decision, what steps Respondents have taken to comply herewith.[4]

Dated at Washington, D.C.

. . . . . .

Benjamin K. Blackburn
Trial Examiner

[4] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith."

*Corresponds to page 47.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board having found, after a trial, that we violated Federal law by engaging in a course of conduct by which we got rid of a labor organization of your choice and replaced it with one of our choice, we hereby notify you that:

The National Labor Relations Act gives all employees these rights:

To engage in self-organization.
To form, join, or help unions.
To bargain collectively through a representative of their own choosing.
To act together for collective bargaining or other aid or protection.
To refrain from any or all of these things.

WE WILL NOT contribute assistance or support to International Union of District 50, Allied and Technical Workers of the United States and Canada, and its Local Union 13974, or any other labor organization as your collective-bargaining representative.

WE WILL withdraw and withhold recognition from International Union of District 50, Allied and Technical Workers of the United States and Canada and its Local Union 13974, and

*Corresponds to page 48.

cease giving effect to the collective-bargaining agreement of Rushton & Mercier Woodworking Co., Inc., with those labor organizations unless and until such time as one of them is certified by the Board; WE WILL NOT refuse to recognize and bargain with Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as your exclusive collective-bargaining representative.

WE WILL reimburse present and former employees for any initiation fees, dues, or other moneys withheld from their wages for the benefit of International Union of District 50, Allied and Technical Workers of the United States and Canada, and its Local Union 13974; and make whole the employees of Rand & Co., Inc., who were laid off on April 30, 1971, for any earnings they may have lost as a result of our discrimination against them with interest at 6 percent per annum.

WE WILL NOT unilaterally change the terms and conditions of your employment, including subcontracting bargaining unit work, without bargaining with your representative.

WE WILL, upon request, bargain collectively with Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as your exclusive representative and, if an understanding is reached, embody it in a signed agreement. The unit appropriate for such bargaining is:

> All journeymen and apprentice carpenters employed by Rushton & Mercier Woodworking Co., Inc., and/or Rand & Co., Inc., excluding all other employees.

WE WILL NOT lay off our employees and close our plant in order to get rid of an incumbent labor organization and replace it with another.

*Corresponds to pages 48-49.

WE WILL offer to as many of the Rand & Co., Inc., employees laid off on April 30, 1971, as are presently required by Rushton & Mercier Woodworking Co., Inc., to operate our plant, discharging, if necessary, other employees of Rushton & Mercier Woodworking Co., Inc., reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges; and place the names of any employees who are not offered immediate and full reinstatement on a preferential hiring list and offer them immediate and full reinstatement on the same conditions as above as vacancies occur.

WE WILL NOT, in any manner, interfere with you or attempt to refrain or coerce you in the exercise of the above rights.

All our employees are free, if they choose, to join Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other labor organization.

RUSHTON & MERCIER WOOD-
WORKING CO., INC.
RAND & CO., INC.

. . . . . .
(Employer)

Dated . . . . . .

By . . . . . .
(Representative) (Title)

We will notify immediately any employees of Rand & Co., Inc., laid off on April 30, 1971, who are presently serving in the Armed Forces of the United States of the right to full reinstatement, upon application after discharge from the Armed

*Corresponds to pages 49-50.

Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Seventh Floor, Bulfinch Building, 15 New Chardon Street, Boston, Massachusetts 02114, Telephone 617 223-3353.

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*Corresponds to page 50.

[Dated 4-25-73]

[ID 7282
Boston, Mass.]

DECISION AND ORDER

On August 25, 1972, Administrative Law Judge[1] Benjamin K. Blackburn issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[2] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.

The Administrative Law Judge finds that Respondents violated Section 8(a)(1), (2), (3), and (5) of the Act. Respondents except to these findings. For the reasons stated herein, we agree that Respondents did violate Section 8(a)(1), (2), (3) and (5) by certain of their conduct in September 1971. However, as more fully discussed hereinafter, we do not adopt the Administrative Law Judge's finding that Respondent Rand acted

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1 The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

2 Respondents' motion for oral argument is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

*Corresponds to page 51.

unlawfully in shutting down its operation in April 1971 and in subcontracting work without consulting the Charging Party during the period from May through August 1971.

The facts are set forth in the Administrative Law Judge's Decision. In brief summary they are as follows:

> As of April 1971, Rand was actively engaged in the manufacture of store fixtures. Its carpenters[3] were represented by Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. On April 30, 1971, Rand shut down for lack of work and laid off all the unit employees[4] and almost all nonunit employees. Approximately 4 months later, store fixture production operations were resumed at the Rand Boston facility, this time by a wholly owned subsidiary of Rand formed for that purpose, Rushton & Mercier of Massachusetts. This company was capitalized with assets previously used by Rand & Co., in its production operations which had been shut down in April. The name chosen for the new corporation was purchased from Rand subcontractor, Rushton & Mercier of New Hampshire. Rand & Co., employees were not recalled from layoff to staff the resumed operation. Instead, Rushton & Mercier of Massachusetts initially obtained its employee complement by hiring the employees of the subcontractor whose name it was using. Rushton & Mercier of Massachusetts also recognized the collective-bargaining representative of its employees and assumed, as a "successor," the subcontractor's obligations under its collective-bargaining agreement. When a Local 51 business representative, upon discovering that production

3 The greater part of its work force.

4 One unit employee was transferred to another of the Rand companies, Rand Industries.

*Corresponds to pages 51-52.

had resumed at the Rand & Co., plant, telephoned Rand's attorney, Wasserman, he was told that Rand & Co., had not resumed operations. Thus, although Rand apparently may still have been recognizing Local 51 as the exclusive bargaining representative for the laid-off Rand & Co., carpenters, as of September 1971 that was a largely academic right with the facility where Rand production was formerly carried on now being used by a wholly owned subsidiary of Rand whose employees were now represented by District 50.

The General Counsel contends that Rushton & Mercier of Massachusetts is nothing more than a disguised continuance of Rand which exists for the purpose of permitting Rand to substitute a less expensive union for the collective-bargaining representative of the Rand employees, Local 51.[5] Moreover, General Counsel contends that the entire congeries of facts herein, resulting not in a change of ownership of business, but, rather, in a change in union, amply demonstrate the underlying motivation of Respondent to get rid of Local 51.[6]

Respondents contend that their actions were dictated by a chain of events related to the economic situation and other economic factors which were in no way contrived by Respondents.

The General Counsel contends that Rushton & Mercier and Rand are a single integrated enterprise and that Rushton & Mercier is a continuance and alter ego of

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5 Officials of Respondent Rand had complained that Rand was not able to pay the Local 51 contract rates and still remain competitive.

6 Citing *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26.

*Corresponds to pages 52-53.

Rand. We agree. The record reveals that the Respondents have interlocking directors and management,[7] interlocking officials,[8] and the same ownership.[9] As noted above, Rushton & Mercier of Massachusetts is using the same plant and equipment previously used by Rand. Most, if not all of the orders produced by Rushton & Mercier of Massachusetts are obtained by Rand salesmen using the Rand name.[10] Morris Rand exercises control over both companies. Respondents contend, however, that the nature of the business operated by Rand was different than that operated by Rushton & Mercier of Massachusetts in that Rand was engaged exclusively (in its shop) in the manufacture on a volume basis for large discount chains, principally for the Zayre chain, and that Rushton & Mercier of Massachusetts is engaged in the manufacture of customized orders. It is unquestionably true that to some extent the manufacturing operations of the two Respondents are different because Rand has been unable to obtain large volume orders and has therefore been forced

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7 John Burke was production manager of Respondent Rand and is director and general manager of Respondent Rushton & Mercier of Massachusetts.

8 The officers of Respondent Rand are Morris Rand, president and treasurer; Robert C. Paiva, vice president; Burton Peltz, clerk; and the directors are Morris Rand, Eunice V. Rand, and Arthur T. Wasserman. The officers of Respondent Rushton & Mercier of Massachusetts are Morris Rand, president and treasurer; Burton Peltz, clerk; and the directors are Morris Rand, Frank Fiorella, and John Burke.

9 Respondent Rushton & Mercier is wholly owned by Rand & Co., Respondent Rand & Co., is wholly owned by Eunice Rand, the wife of its president, Morris Rand.

10 The testimony is very vague as to when, if ever, sales are solicited using the name of Rushton & Mercier. At the hearing, the sales manager, Fiorella, testified that he presently only has business cards with the Rand name and the name of Brankowitz, a wholly owned subsidiary of Rand in New Jersey.

*Corresponds to pages 53-54.

to rely on custom orders. However, these differences are no more than the adjustments that are frequently required by manufacturers as the nature of their sales change. The custom orders were produced in the same plant using the same equipment as was used to produce the high volume orders.[11] The Rand employees who worked on the high volume orders possessed the necessary skills to produce the custom orders.[12] The end product is basically the same. Under these circumstances, the differences between the high volume production and the customized order production are not sufficiently great to warrant our finding that Rushton & Mercier of Massachusetts is a separate entity in the face of the strong evidence to the contrary discussed above.

Respondent Rushton & Mercier hired a completely new work force for the reopening of the plant in Boston, failing to recall any of the laid-off employees represented by Local 51. It then recognized District 50 as the collective-bargaining representative, stating that District 50 had represented these employees when they worked for another employer. While it did subsequently hire some of the Rand employees, it did so only on the basis that they were new hires coming into a plant where District 50 was recognized as the collective-bargaining representative. In agreement with the Administrative Law Judge, we find that such conduct violated Section 8(a)(3) in that it discriminated against Rand & Co., employees represented by Local 51. We also agree that specific proof of an intent to discourage membership in Local 51 is unnecessary as

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11 Respondent Rushton & Mercier does not use one machine called a double-end tenoner because it is only suitable for mass production.

12 In fact, Respondents contend that for the most part it takes less carpentry skill, not more, to do the custom work.

*Corresponds to pages 54-55.

Respondents' conduct inherently discouraged such union membership.

The key question is whether an employer, when resuming operations after an economic layoff, may hire a whole new work force represented by one union to the exclusion of his laid-off employees who are represented by a different union. In other words, can he, by hiring a new work force instead of recalling laid-off employees, rid himself of the union that represents these employees with a resulting effect of substituting a new union for the one which previously represented his employees. The Supreme Court in *N.L.R.B.* v. *Great Dane Trailers*, 388 U.S. 2633, stated:

> Some conduct . . . is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive. [citing *N.L.R.B.* v. *Brown* 380 U.S. 278 at 287; *American Ship Building Co.* v. *Labor Board* 380 U.S. 300 at 311.] That is, some conduct carries with it unavoidable consequences which the employer not only foresaw but which he must have intended' and this bears 'its own indicia of intent.' [citing *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 at 228, 231.] If the conduct in question falls within this 'inherently destructive' category, the employer has the burden of explaining away, justifying or characterizing 'his actions as something different than they appear on their face,' and if he fails, 'an unfair labor practice charge is made out.' *Id.* at 228. And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike

*Corresponds to pages 55-56.

> the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. *Id.* at 229.

It is obvious that Respondents' actions here were "inherently destructive of employee interests" in that the natural effect of Respondents' failure to recall any of the employees represented by Local 51 when they resumed operation was to discourage membership in a union. Thus, such conduct is violative of Section 8(a)(3) unles Respondents can establish that they had adequate business justification for their actions.

Respondents seek to justify the result arrived at here as that which naturally resulted from a series of events over which they had no control. As part of their explanation, Respondents present a number of reasons why they could not continue to subcontract to Rushton & Mercier of New Hampshire and thus why it became necessary to again use the Rand Boston facility. That, of course, is not the issue here. Rather the question is did Respondents have adequate justification for hiring new employees rather than recalling laid-off employees when they did resume operations. The only apparent business justification they had for hiring the nine Rushton & Mercier of New Hampshire employees is the fact that they were doing Rand work for that Rand subcontractor.[13] In our view that justification is inadequate to meet their burden where, as here, Respondents failed to recall employees who were capable of doing the work and had

13 Respondents contend that Rushton himself and the working foreman, Maurice Marquis, of Rushton & Mercier of New Hampshire had special skills. In our opinion, Respondents' desire to obtain the services of two individuals with special skills as plant manager and working foreman does not jusify the hiring of all the Rushton & Mercier of New Hampshire employees.

*Corresponds to pages 56-57.

previously worked at the plant on the very machines which were now being put back into operation.

Respondents also contend that Rushton & Mercier of Massachusetts is a successor to Rushton & Mercier of New Hampshire, relying on the fact that the work was the same as the work done by Rushton & Mercier of New Hampshire and the initial work force was the same. The difficulty with this contention is that (1) the work being done was Rand work which had been subcontracted and was work which Rand carpenters were entitled to when it was performed by Rand and (2) the basic issue to be determined is whether Respondents properly hired the work force of Rushton & Mercier of New Hampshire rather than recalling the Rand & Co., employees. Respondents cannot unlawfully fail to rehire Rand's laid-off employees and then claim that they are successor to another company because they hired that company's employees.

The Administrative Law Judge finds that the replacement of Local 51 was, in fact, part of a scheme carried out by Respondents to get rid of an expensive union and to substitute one which was less expensive. While, as indicated above, we would find that Respondents had violated Section 8(a)(3) even if the evidence establishes that there was, in fact, such a scheme.

Respondents have engaged in several transactions here and there is at least one unexplained coincidence present which, when considered in combination with those transactions, in our view, establishes that Respondents were attempting to bring about a situation which would enable them to get rid of Local 51.

*Corresponds to pages 57-58.

The first transaction was the buying of the name and goodwill of Rushton & Mercier of New Hampshire. The explanation offered that Respondents wanted to subcontract to Rushton & Mercier of New Hampshire without fear that that company would steal customers seems unlikely. Rand & Co. was represented in that transaction by very competent counsel, Wasserman, who undoubtedly knew that the purchase of the name and goodwill did little, if anything, to prevent such stealing of customers and that much better protection could be achieved by simply contracting with the subcontractor against his engaging in such conduct.[14] Also, Respondents state that Rand hoped to acquire the services of Rushton by this route. However, there is nothing to indicate that Rushton's services could not be acquired in some other way. On the other hand, the purchase of this name provided an ostensible support for Respondents' claim that another company had replaced Rand at the Rand facility. Next came the highly suspect coincidence of a District 50 representative showing up to organize the Rushton & Mercier of New Hampshire employees the Monday after the Friday that the sale of the name and goodwill was completed.[15] Next was Rushton's consultation with Rand officials prior to recognizing District 50 and the use of a Rand official, Burke, to negotiate the collective-bargaining

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14 We note also that there was very little, if any, use of the name and goodwill of Rushton & Mercier to obtain business. Unlike the case of Brankowitz, which Rand also acquired, there is no evidence that Rushton & Mercier had any customers whom Rand hoped to obtain by such a move.

15 We note that Burke testified that Respondents had some difficulty in selling to some companies unless the furniture was union stamped.

*Corresponds to pages 58-59.

agreement.[16] An unusual aspect of the negotiations themselves was Burke's insistence on a clause in the contract providing that the contract was to be effective at Salem, New Hampshire, "or any subsequent or new location of this plant." In our experience, it is not unusual for unions to insist on such a clause, but it is extremely unusual for employers to do so and suggests that Rand was creating a basis for asserting that the contract was to be effective elsewhere. The remaining event which suggests a conscious purpose to get rid of Local 51 was the one discussed above, the reopening of the Rand plant without recalling the Rand employees. When considered individually, there may be some weak but plausible explanation for all but the last of these transactions. However, these events, when considered in combination against the background of Rand's stated concern that its labor costs were the source of its difficulties, present a clear picture of an employer who is maneuvering into a position where it can reopen its manufacturing operations with a less expensive union representing its employees. In our view, such evidence is sufficient to establish that Respondents violated Section 8(a)(1) and (3) by replacing the laid-off

16 Burke testified he did so because Respondents' deals with Rushton & Mercier were on a cost-plus basis and therefore the cost of the contract bore on the cost of the product.

*Corresponds to pages 59-60.

employees with others in order to get rid of their collective-bargaining representative.[17]

However, while Respondents took a number of steps pursuant to this scheme, we do not agree that Respondents actually committed any violations prior to September 1971. In particular, since it is clear from the record that Respondent Rand & Co., would have shut down in any event in April 1971, we find that the shutdown was not in violation of the Act, even though Respondents subsequently used that shutdown as part of their efforts to eliminate Local 51, as the collective-bargaining representative. Similarly, as to Respondent Rand & Co.'s subcontracting of work during the May through August period, the record is clear that Rand had in the past always

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17 If any further indications of such a plan are required, we need only look at the credited testimony of employee Richard Infantino that Burke told him in somewhat vague language in April that Rand was interested in moving a New Hampshire company to Boston because Rand was interested in getting a union at a lower rate of pay. (Respondents contend that this credibility resolution should be overruled as the Administrative Law Judge also credited Burke's testimony that he had not heard of Rushton & Mercier prior to June. However, the reference to the New Hampshire company is not necessarily a reference to Rushton & Mercier. Moreover, Burke was new with Rand at the time and would in all likelihood only be repeating what he had been told by other Rand officials. These officials were aware of Rushton & Mercier having, according to Fiorella, previously subcontracted work to them. Thus, it is not inconsistent for Burke to have known of such a plan in general terms while not knowing the particular company. Accordingly, we find insufficient basis for overruling the Administrative Law Judge's credibility resolution.)
We note also that according to Infantino's credited testimony Burke stated that Morris Rand was releasing Infantino because he was afraid that having Local 51 member working there might force Rand to sign a new Local 51 contract, indicating a Rand desire to get rid of Local 51.

*Corresponds to pages 60-61

subcontracted between five and ten percent of its work without consulting with Local 51 and that the work involved was not sufficient to warrant reopening the plant. Therefore, we find that its failure to consult Local 51 as to this subcontracting did not violate the Act. Accordingly, we find no violation as to these events, even though Respondents subsequently took advantage of this subcontracting in their efforts to eliminate Local 51 and may have directed the work to Rushton & Mercier of New Hampshire to better enable them to do just that.

Of course, a finding of a violation of Section 8(a)(2) in Respondents' recognition of District 50 follows as a matter of course from our finding that Respondents discriminatorily refused to recall employees represented by Local 51 and hired instead employees represented by District 50. Similarly, a violation of Section 8(a)(5) follows from Respondents' refusal to bargain with Local 51 after having recognized District 50. Respondents took the position, when asked by Local 51 about the plant reopening, that Respondent Rand had not reopened. Thus, any additional bargaining request by Local 51 would have been futile. Accordingly we shall affirm the Administrative

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18 Also, we do not find that the decision to purchase the name and goodwill of Rushton & Mercier of New Hampshire was in violation of the Act in and of itself. We do not find that steps taken by Rushton & Mercier of New Hampshire to recognize District 50 or the part Respondent Rand & Co. played in those efforts constitute a violation of the Act, as Rushton & Mercier of New Hampshire was not a party to this proceeding. Finally, we do not find that Respondents' acts of incorporating Rushton & Mercier of Massachusetts constitute a violation of the Act in and of themselves.

*Corresponds to pages 61-62.

Law Judge's finding that Respondents violated Section 8(a)(2) and 8(a)(5).[19]

2. Remaining for consideration are two matters of remedy: (a) The Administrative Law Judge's ordering reinstatement of nonunit employees and (b) the Administrative Law Judge's leaving to the compliance stage the matter of the adequacy of the letters sent by Respondents to the laid-off Rand employees in October and November 1971 and March 1972 to toll backpay liability.

The Administrative Law Judge finds that nonunit employees should be ordered reinstated. We do not agree. These employees were not alleged as discriminatees and, therefore, it would be a violation of due process to now find that they were discharged in violation of the Act and therefore entitled to reinstatement. Moreover, there is not sufficient evidence in the record to warrant a finding that they were in fact discriminated against when Respondents resumed operations in September 1971.

As to the letters, Respondents sent all of the laid off Rand employees letters offering them employment. Some of the letters were dated October 26, 1971; others November 26, 1971; and the remainder March 17, 1972. The letters read as follows:

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19 We reject Respondents' contention that bargaining with Local 51 would have been futile. In the past, bargaining with Local 51 had always produced agreement. Moreover, it was Respondent's unfair labor practices here which make it impossible to know whether bargaining with Local 51 would have produced agreement.

*Corresponds to pages 62-63.

Dear

The undersigned company hereby offers you employment in the manufacturing operations at its plant located at 300 C Street, South Boston, the location of the plant formerly operated by Rand & Company, Inc.

This offer of employment includes all of the rights and privileges, if any, to which you might be legally entitled by virtue of your former employment, at said location, with Rand & Company, Inc.

If you are interested in our offer of employment please report to the undersigned in person at the above address as soon as possible.

If we have not heard from you by 3 working days after receipt of this letter, we will assume you are not interested in this offer of employment with the undersigned company.

Very truly yours,

RUSHTON & MERCIER WOODWORKING, INC.

Thomas Rushton
Plant Manager

Although the letter is signed by Rushton, Burke talked to all employees who came in after receiving the letter and testified that he told them the following:

*Corresponds to page 63.

> Number one, we told these people there was a union present who had a union scale and that they would be interviewed. And based on their ability to convince the supervisor, Rushton, of their skills, he would offer them a job somewhere on that scale or whatever he thought they qualified. And they could ultimately move up as they proved themselves. Secondly, as to the sentence in here (the letter) involving rights and privileges, we understand that there was a suit pending by their union versus Rand and Co., and Rushton and Mercier and Co., and that should anything result from that suit causing them to be paid at the higher rate they would get this higher rate of pay retroactively to whenever they came to work.

Discriminatees are entitled to reinstatement to their former positions or, if these jobs no longer exist, substantially equivalent positions. Here Respondents were simply offering the laid-off employees jobs as new hires, something clearly less than they were entitled to receive. The notation that they might receive the wages they were entitled to at some time in the future is not sufficient to turn this otherwise invalid offer into a valid offer. An employer charged with unfair labor practices may, of course, toll backpay by offering to reinstate employees to their former positions or, if the positions are no longer available, to equivalent positions. However, he cannot do so by offering them lesser positions even if he, at the same time, assures them that they will receive in addition whatever they will be awarded as a result of litigation. Such a result would shift the risk of an employer's unfair labor practices to the wronged innocent parties, the discriminatees. Accordingly, we find that Respondents'

*Corresponds to pages 63-64.

letters to the Rand employees were ineffective to toll backpay liability.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondents Rushton & Mercier Woodworking Co., Inc., and Rand & Co., Inc., both of Boston, Massachusetts, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified.

1. Substitute the following for paragraph 1(c):

"(c) Refusing to recall laid-off employees and hiring other employees in order to get rid of an incumbent labor organization and replace it with another, thereby discouraging membership in Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO."

2. Delete paragraph 1(d) and reletter the remaining paragraphs accordingly.

3. Insert in paragraph 2(d), (e), (f), and (g) the words "represented by Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO" after the words "Rand & Co., Inc."

*Corresponds to pages 64-65.

4. Substitute the attached notice for the Administrative Law Judge's notice. Dated, Washington, D.C., April 25, 1973.

. . . . . .
John H. Fanning, Member

. . . . . .
Ralph E. Kennedy, Member

. . . . . .
John A. Penello, Member

(SEAL) **NATIONAL LABOR RELATIONS BOARD**

*Corresponds to page 65.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board having found, after a trial, that we violated Federal law by engaging in a course of conduct by which we got rid of a labor organization chosen by employees and replaced it with one of our choice, we hereby notify you that:

The National Labor Relations Act gives all employees these rights:

To engage in self-organization.
To form, join, or help unions.
To bargain collectively through a representative of their own choosing.
To act together for collective bargaining or other aid or protection.
To refrain from any or all of these things.

WE WILL NOT contribute assistance or support to International Union of District 50, Allied and Technical Workers of the United States and Canada, and its Local Union 13974 or any other labor organization, as your collective-bargaining representative.

WE WILL withdraw and withhold recognition from International Union of District 50, Allied and Technical Workers of the United States and Canada, and its Local Union 13974, and

*Corresponds to page 66.

cease giving effect to the collective-bargaining agreement of Rushton & Mercier Woodworking Co., Inc., with those labor organizations unless and until such time as one of them is certified by the Board; WE WILL NOT refuse to recognize and bargain with Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as your exclusive collective-bargaining representative.

WE WILL reimburse present and former employees for any initiation fees, dues, or other moneys withheld from their wages for the benefit of International Union of District 50, Allied and Technical Workers of the United States and Canada, and its Local Union 13974, and make whole the employees represented by Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO of Rand & Co., Inc., who were laid off on April 30, 1971, for any earnings they may have lost as a result of our discrimination against them with interest at 6 percent per annum.

WE WILL, upon request, bargain collectively with Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as your exclusive representative and, if an understanding is reached, embody it in a signed agreement. The unit appropriate for such bargaining is:

> All journeymen and apprentice carpenters employed by Rushton & Mercier Woodworking Co., Inc., and/or Rand & Co., Inc., excluding all other employees.

WE WILL NOT refuse to recall laid-off employees and hire other employees in order to get rid of an incumbent labor organization and replace it with another.

WE WILL offer to as many of the Rand & Co., employees represented by Local 51, United Brotherhood of Carpenters and

*Corresponds to pages 66-67.

Joiners of America, AFL-CIO, laid off on April 30, 1971, as are presently required by Rushton & Mercier Woodworking Co., Inc., reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and place the names of any employees who are not offered immediate and full reinstatement on a preferential hiring list and offer them immediate and full reinstatement on the same conditions as above as vacancies occur.

WE WILL NOT, in any manner, interfere with you or attempt to restrain or coerce you in the exercise of the above rights.

All our employees are free, if they choose, to join Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other labor organization.

RUSHTON & MERCIER WOOD-
WORKING CO., INC.
RAND & CO., INC.

. . . . . .
(Employer)

Dated . . . . . .

By . . . . . .
(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

*Corresponds to pages 67-68.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Seventh Floor, Bulfinch Building, 15 New Chardon Street, Boston, Massachusetts 02114, Telephone 617 223-3353.

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*Corresponds to page 68.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-136

RUSHTON & MERCIER WOODWORKING CO., INC. & RAND & COMPANY, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the court of appeals (Pet. 32-34) are unreported. The Board's decision and order are reported at 203 NLRB No. 17 (Supp. App. 1-72).[1]

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[1] "Supp. App." refers to the supplemental appendix to the petition.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1974 (Pet. 32). On May 31, 1974, Mr. Justice Brennan extended the time in which to file a petition for writ of certiorari to August 19, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that Rushton & Mercier was a continuation and *alter ego* of Rand and that the companies violated the National Labor Relations Act by refusing to recall Rand's laid-off employees because of their representation by Local 51, refusing to bargain with Local 51, and recognizing District 50.

2. Whether the Board properly found that the letters offering re-employment to the laid-off Rand employees were insufficient to toll backpay liability.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3-5.

STATEMENT

A. The Board's Findings of Fact

Prior to April 30, 1971, Rand manufactured store fixtures at its plant in Boston, Massachusetts. Mor-

ris Rand is president of the company and his wife owns all of its stock (A. 11, 151, 158).[2] Most of Rand's employees were carpenters, included in a craft unit represented by Local 51[3] (A. 14, 89-90). Rand had collective bargaining agreements with Local 51 for over 20 years—it signed the area contract which the union negotiated with the Woodworking Association of Boston & Vicinity (A. 11, 201).

Prior to 1971, Rand's principal customer was Zayre Company, a national chain of discount department stores (A. 12, 285). However, in January 1971, Rand lost the Zayre account (A. 13-14, 328-330, 333). Thereafter, John Burke was hired as Rand's production manager and began his new job on April 5, 1971[4] (A. 13-14, 332). Burke scheduled the work on the remaining orders to be completed by April 30, the day the current Local 51 contract was to expire (A. 14, 199, 334-335).

About the middle of April, Burke told Richard Infantino, a carpenter, that a shutdown would soon be necessary because "they [Rand] were having trouble competing with other companies and they needed men at a different pay scale. They couldn't afford to pay Local Union 51 rates, which were then $4.80 an hour, and would have been higher after the contract" (A. 15, 250). On the afternoon of

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[2] "A." refers to the appendix, and "S.A." to the supplemental appendix, to the briefs in the court below.

[3] Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("Local 51").

[4] All dates hereafter are in 1971 unless otherwise indicated.

April 30, Burke laid off 22 of the remaining 24 carpenter-unit employees still on the payroll and 8 of 9 non-unit employees (A. 16, 200).

After Rand closed its plant on April 30, it continued to receive some small orders, most of which were subcontracted to Rushton & Mercier (hereafter "R&M"), which was located in Salem, New Hampshire (A. 17, 186). This company was owned by Thomas Rushton and Edward Mercier, who had equal shares, and Clarence Hall, who had a smaller share (A. 17, 236). Prior to June 25, R&M had two employees, and had never bargained with a union (A. 18, 173-174). Before Rand began subcontracting the manufacture of store fixtures to R&M, its principal product was kitchen cabinets (A. 18, 349).

Burke learned that R&M was encountering economic difficulties and he reported this to Mr. Rand, who asked Burke to investigate its financial situation (A. 19, 167). After Burke's investigation, Rand decided not to purchase R&M as a going concern, but instead to purchase its name and goodwill (A. 19, 203-205).

A contract of sale was prepared by Arthur Wasserman, counsel for Rand, and, on June 25, Burke met in Salem with the owners of R&M and their attorney for final negotiation of the sale (A. 19, 350-352). R&M agreed to sell its name and goodwill to Rand for $1,000 (A. 19, 351). A sale agreement was signed by the parties, which provided in pertinent part as follows:

> 1. SELLER [i.e., Rushton & Mercier (New Hampshire)] agrees that for a period of four (4) months or more (as BUYER [i.e., Rand & Co.] may determine) from the date hereof, SELLER will conduct its business in the regular and usual course and shall manufacture such work for BUYER as BUYER may choose SELLER to manufacture for it, all such work to be performed at Seller's premises and in accordance with the terms and conditions of this Agreement [i.e., for costs plus 7½ percent profit].
>
> * * * * *
>
> 4. Tom Rushton, an employee of SELLER, agrees to work for BUYER or for a new corporation to be formed by BUYER utilizing the name (or any modification or variation thereof) conveyed to BUYER by this Agreement, in a capacity similar to that now served by the said Rushton or in such capacity as BUYER may request, BUYER hereby agreeing to pay him at the rate of (SEE ATTACHED SCHEDULE). Such employment shall commence upon the termination of Seller's business operation under its present corporate name or at such time as BUYER shall so request. [A. 20, 120, 121.]

Both of these provisions were included at Rand's insistence (A. 20, 227-228).

The following Monday, June 28, two organizers for District 50,[5] Domenic DiPilato and William Foley, visited the R&M facility and invited all the employ-

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[5] International Union of District 50, Allied and Technical Workers of the United States and Canada, and its Local Union 13974 ("District 50").

ees to lunch at the 88 Restaurant. The increase in R&M's business as a result of the Rand subcontracts had required it to hire four new employees (A. 210). All six R&M employees working in the shop that day attended the luncheon, and thereafter signed District 50 organization cards (A. 20-21, 230-231). That afternoon DiPilato returned to the R&M plant, where he requested recognition for District 50 on the basis of the signed cards (A. 21, 175-176). Thomas Rushton referred DiPilato to Burke, who inspected the cards but did not give an immediate answer. DiPilato departed, leaving a recognition agreement form with Burke (A. 21, 176). Burke took the agreement to Boston, obtained Rand's approval of it, and then returned to Salem and gave R&M permission to recognize District 50 (A. 21, 179-180). On July 1, R&M signed a recognition agreement with District 50 (A. 21, 180-181).

In the ensuing negotiations on a collective bargaining agreement, Burke acted as sole negotiator for R&M although he frequently sought Wasserman's approval (A. 21, 118-119). On August 3, agreement was reached on a three-year contract, which was back-dated to June 28 (A. 21, 133-134, 367-368). The contract provided for various grades and job classifications; the highest non-supervisory wage rate was $4 per hour for a millman and the lowest was $2 per hour for a laborer (A. 21, 135, 136). It also provided for a 30-cent per hour raise across-the-board in the second and third years of the agreement. Article I of the contract provided that the company

would recognize District 50 as the exclusive bargaining agent for all production employees and "that such recognition is limited to employees in the company's plant at Salem Depot, New Hampshire, or any subsequent or new location of this plant" (A. 21-22, 123-124). This latter phrase was included at Burke's suggestion (A. 22).

During June, July, and August, all the work turned out by R&M in New Hampshire was work subcontracted by Rand. Around the end of August, Burke informed DiPilato that the work was going to be returned to Boston in the near future (A. 22, 352-353). On September 2, a wholly-owned subsidiary of Rand was incorporated in Massachusetts under the name of Rushton & Mercier Woodworking Co., Inc., the name Rand had purchased from Rushton & Mercier (New Hampshire) (A. 22, 136-137). Morris Rand became president, treasurer, and one of the directors of the "new" company (A. 27, 54, 157). The other two directors were Frank Fiorella, former production and sales manager for Rand & Co., and John Burke (A. 22, 54, 158). The company was capitalized at $100,000, comprised entirely of machinery and other assets of Rand (A. 22). It leased the basement, third floor, and part of the second floor of Rand's manufacturing plant (A. 22, 54, 193).

On August 28, Burke conferred with DiPilato about the move to Boston and agreed to recognize District 50 as the representative of employees of R&M (Massachusetts) and apply District 50's contract with R&M (New Hampshire) to them after

the move (A. 23, 353-354). On September 7, R&M (Massachusetts) began operations with Thomas Rushton, Clarence Hall, and all six of the employees formerly employed by R&M (New Hampshire) (A. 23, 219, 354). Edward Mercier continued operations at the Salem plant, using his own name until December, when the building was sold as part of the liquidation of R&M (New Hampshire). R&M (New Hampshire) still exists as a corporate entity, although it has no assets and no business activities. (A. 23, 246.)

Immediately after production began in Boston, R&M began to expand its work force and placed advertisements in newspapers (A. 23, 354). No attempt was made to make contact with any of the carpenters represented by Local 51 whom Rand had laid off in April. Several of the laid-off carpenters came to the plant, however, and were offered jobs as new employees at the lower rates specified in the District 50 contract (A. 23; S.A. 7).[6]

By late October, R&M had expanded its work force to approximately 20 employees, including four or five former Rand employees whom R&M hired in September (A. 24, 210). Among those hired in September were Frank Tino and Pasquale Colacetti. Shortly after they were hired, Thomas Rushton gave them a number of forms to be filled out, including an authorization form to deduct District 50 dues from their wages (A. 24; S.A. 7-8).

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[6] The new agreement between Local 51 and the Association contained a wage rate of $5.35 per hour (A. 12, 214-215).

When Tino and Colacetti refused to authorize the deduction, Rushton told them that they would have to sign in order to continue working for R&M. Tino and Colacetti thereupon quit (*ibid.*). After learning that production had been resumed in Rand's old plant, Mario Natale, business agent for Local 51, talked to Wasserman, who denied that Rand had reopened its plant (A. 24-25, 142).

Despite the efforts of Rand Sales Manager Frank Fiorella, Rand had been unable to obtain any contracts similar to those it had previously received from Zayre. Consequently, all of the work performed by R&M (Massachusetts) since September 7 was similar to the work Rand had previously subcontracted to R&M (New Hampshire). (A. 25; S.A. 12-13.)

On October 26, November 26, and March 17, 1972 —after Local 51 had filed unfair labor practice charges with the Board—R&M sent the following letter to the laid-off Rand employees (A. 63, 147):

> Dear ————————,
>
> The undersigned company hereby offers you employment in the manufacturing operations at its plant located at 300 C Street, South Boston, the location of the plant formerly operated by Rand & Company, Inc.
>
> This offer of employment includes all of the rights and privileges, if any, to which you might be legally entitled by virtue of your former employment, at said location, with Rand & Company, Inc.

> If you are interested in our offer of employment please report to the undersigned in person at the above address as soon as possible.
>
> If we have not heard from you by 3 working days after receipt of this letter, we will assume you are not interested in this offer of employment with the undersigned company.
>
> Very truly yours,
>
> RUSHTON & MERCIER WOODWORKING, INC.
>
> Thomas Rushton
> Plant Manager

When the employees responded to this letter, Burke interviewed them. He made two points:

> Number one, we told these people that there was a union present who had a union scale and that they would be interviewed. And based on their ability to convince the supervisor, Rushton, of their skills, he would offer them a job somewhere on that scale or whatever he thought they qualified. And they could ultimately move up as they proved themselves. Secondly, as to the sentence in here (the letter) involving rights and privileges, we understand that there was a suit pending by their union versus Rand and Co., and Rushton and Mercier and Co., and that should anything result from that suit causing them to be paid at the higher rate they would get this higher rate of pay retroactively to whenever they came to work. [A. 63-64, 356-357; S.A. 9-10.]

B. The Decisions Below

On the basis of the foregoing facts, the Board, in agreement with the Administrative Law Judge, found that Rushton & Mercier (Massachusetts) is a continuance and *alter ego* of Rand (Supp. App. 54-55), and that those companies failed to recall the laid-off Rand employees because they were represented by Local 51, thereby violating Section 8(a)(3) and (1) of the Act (Supp. App. 59-62). The Board also found that the companies, in recognizing and contracting with District 50 and in withdrawing recognition from Local 51, violated Section 8(a)(2) and (5) of the Act (Supp. App. 63-64). Finally, the Board found that the letters sent to former employees on October 26 and November 26, 1971, and March 17, 1972, together with Burke's rehire interview, were insufficient to toll the companies' backpay liability (Supp. App. 64-67).

The Board ordered Rand and Rushton & Mercier (Massachusetts) to cease and desist from the unfair labor practices found and from "in any manner" interfering with, restraining or coercing employees in the exercise of their Section 7 rights; to withdraw recognition from District 50; and to reimburse employees for any initiation fees, dues, or other monies withheld from their wages for the benefit of District 50. Further, the order requires the companies to bargain collectively with Local 51; to offer the Rand employees, who were laid off on April 30, full reinstatement to their former or substantially equivalent positions, and to make them whole for any loss of

pay resulting from the discrimination; and to post the usual notices. (Supp. App. 43-47, 67-68.)

The court of appeals concluded that the Board's unfair labor practice findings were supported by substantial evidence, and enforced its order in full (Pet. 32-34).

ARGUMENT

1. The first issue raised by the petition (Pet. 11-25) is whether substantial evidence supports the Board's findings, sustained by the court below, that Rushton & Mercier was a continuation or *alter ego* of Rand and that those companies failed to recall the laid-off Rand employees because they were represented by Local 51, which the companies desired to replace with District 50. Such an issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, as shown (pp. 2-10), the record amply supports the Board's findings.

2. Petitioners further contend (Pet. 28-30) that, assuming Rushton & Mercier unlawfully refused to rehire the former Rand employees, its backpay obligations terminated when it sent out the offers of reemployment. However, the letters (*supra*, pp. 9-10) do not state that the employees would be given immediate reinstatement if their jobs existed or that they would be paid under the Local 51 contract rates. Moreover, Burke told each employee who responded to the letter "that there was a union present [which] had a union scale," and that, "based on their ability

to convince the supervisor, Rushton, of their skills, he would offer them a job somewhere on that scale" (S.A. 9-10). In these circumstances, the court of appeals properly sustained the Board's conclusion that the letters "may not be fairly construed as the sort of firm offer of reinstatement to former or substantially equivalent positions to which the Local 51 members were entitled" (Pet. 34). *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194.

3. The remaining questions raised by the petition are not presented on the record here.

a. The question whether the Board properly found that Local 51 had not waived its right to bargain collectively (Pet. 25-26) was not raised in the court of appeals,[7] and therefore is not properly before the Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, the Board correctly found that Local 50 had not waived its right to bargain collectively.[8]

---

[7] There, petitioners, in support of the contention that the offers of reinstatement terminated backpay liability, merely mentioned that Rushton & Mercier (Massachusetts) considered itself bound by the agreement with District 50 since no one received any communication from Local 51 after expiration of its agreement with Rand or before Rushton & Mercier (Massachusetts) adopted the Rushton & Mercier (New Hampshire)—District 50 contract (C.A. Br. 31).

[8] A formal bargaining request while the Rand shop was closed would have served no purpose. When the plant resumed production, a representative of Local 51 asked Wasser-

b. Petitioners also contend that the Board erred in ordering reimbursement to employees for initiation fees, dues, and other monies withheld from their wages for the benefit of District 50 (Pet. 27-28). Although this remedy was recommended by the Administrative Law Judge (Supp. App. 44-45), the companies' exceptions merely objected to "the provisions contained under the 'Order' * * * in each and every respect." "Such a general objection [does] not apprise the Board that [the party] intended to press the question now presented * * *." *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255. Accordingly, this contention is not properly before this Court. Section 10(e) of the Act, 29 U.S.C. 160(e). The question is also foreclosed because it was not raised before the court of appeals (see *supra*, p. 13).

In any event, the Board properly directed the companies to assume this remedial obligation as a consequence of their unlawful recognition of District 50. A remedy providing for reimbursement of dues and fees paid under an unlawful collective bargaining agreement effectuates the remedial policies of the Act. Cf. *Sheraton-Kauai Corp.* v. *National Labor Relations Board*, 429 F. 2d 1352, 1357 (C.A. 9), and cases there cited. Such an order "returns to the employees what has been taken from them to support an organization not of their free choice and places the

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man, petitioners' counsel, about the plant's operations. Wasserman informed the union agents that Rand & Co. had not resumed operations (Supp. App. 29-30).

burden upon the Company whose unfair labor practices brought about the situation." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 541.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

THOMAS A. WOODLEY,
Attorney,
National Labor Relations Board.

OCTOBER 1974.

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